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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958

No. [redacted]155

LOUIS KIRSHBAUM,

Appellant,

vs.

THE CITY OF LOS ANGELES including members of City Council, City Clerk and Mayor,

LOS ANGELES DODGERS,

THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES,

Appellees.

STATEMENT OF JURISDICTION.

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LOUIS KIRSHBAUM,

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THE CITY OF LOS ANGELES including members of City Council, City Clerk and Mayor,

LOS ANGELES DODGERS,

THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES,

Appellees.

STATEMENT OF JURISDICTION.

Statement as to Jurisdiction.

Appellant Louis Kirshbaum submits herewith his statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Supreme Court of California in case Number L. A. 25113 granting a peremptory writ of prohibition. Julius Ruben, appealing on the same record, is filing a separate jurisdictional statement.

The Opinions Below.

The opinion of the California Supreme Court is reported in the advance sheets, 51 Advance California Reports 425. A copy of the opinion is attached hereto as Appendix A. The unpublished opinion of the Superior Court is attached hereto as Appendix B.

Jurisdiction.

(1) This is an appeal from a decision of the Supreme Court of California granting a peremptory writ of prohibition against The Superior Court of Los Angeles County from proceeding with an action to permanently enjoin certification of a referendum election approving an ordinance between the City of Los Angeles and the Los Angeles Dodgers. By said decision the Supreme Court of California also upheld the validity of an ordinance adopted by the City Council approving a proposed contract between the City of Los Angeles and the Dodgers. (In a separate case the Superior Court after a contested trial had declared the ordinance to be invalid.)

(2) The Supreme Court granted the peremptory writ of prohibition together with its opinion on January 13, 1959. Appellant's petition for a rehearing was duly filed and denied on February 11, 1959. Notice of appeal to this Court was duly filed by appellant with the Clerk of the Supreme Court of California on April 29, 1959.

(3) The jurisdiction of this Court upon appeal is conferred by 28 U. S. C. A., Sec. 1257(2). The Appellant challenges the power of the Supreme Court of California to grant prohibition (against a lower court) in a case within the lawful jurisdiction of the lower court, and particularly in a case involving disputed questions of fact. Appellants contend that the Supreme Court has by such

action unconstitutionally interfered with the jurisdiction vested in the Superior Court by the Constitution of the State of California and has denied due process of law to the Appellant.

Appellant further challenges the propriety of the Supreme Court's action in approving an ordinance which is repugnant to the United States Constitution. Said ordinance is attached hereto marked Appendix C.

(4) (Cases believed to sustain the jurisdiction of this Court on appeal: (a) whether appellant has been accorded due process of law in the primary sense—whether he has been given a full opportunity to present his case before the proper court;)

Saunders v. Shaw, 244 U. S. 317;
Georgia v. DeCatur, 295 U. S. 171;
Brinkerhoff v. Hill, 281 U. S. 673, 682;
Shelley v. Kaemer, 334 U. S. 1;
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Ex Parte Virginia, 100 U. S. 339, 348;
Scott v. McNeal, 154 U. S. 34, 45, 46;
Great Northern Ry. v. Washington, 300 U. S. 154, 167;
Dower v. Richards, 151 U. S. 658.

(b). Where an ordinance has been approved alleged to impair the obligation of a contract:

Scott v. McNeal, 154 U. S. 34, 45;
Appleby v. New York, 271 U. S. 364, 379;
Coombes v. Getz, 285 U. S. 434 (Certiorari to Supreme Court of California);
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Questions Presented.

1. Did the Supreme Court interfere unconstitutionally with the jurisdiction granted to the Superior Court, and was due process of law thereby denied to the appellant Louis Kirshbaum under the Fourteenth Amendment of the United States Constitution?

2. Did the Supreme Court act unconstitutionally in divesting the Superior Court of its power to determine issues of fact or law, and was due process of law thereby

denied to the appellant Louis Kirshbaum under the Fourteenth Amendment of the United States Constitution?

3. Did the City Council and its Mayor violate due process of law under the Fourteenth Amendment of the United States Constitution in approving an Ordinance for the expenditure of tax funds for the purpose of acquiring and conveying land to a private corporation engaged in a private enterprise for its private profit?

4. Did the City Council and its Mayor violate due process of law under the Fourteenth Amendment of the United States Constitution in approving an Ordinance which proposes to sell land acquired subject to a public purpose Deed restriction, and convey such land to a private corporation without limitation as to its intended use?

5. Did the City Council and its Mayor violate due process of law under the Fourteenth Amendment to the United States Constitution in approving an Ordinance which proposes to delegate to a private corporation engaged in a private enterprise for its private profit the unlimited power to determine the manner in which two million dollars of tax funds may be spent?

6. Did the City Council and its Mayor violate Article I, Section 10, of the United States Constitution, in adopting an ordinance which approves the extinguishment of a public purpose Deed restriction thus constituting an impairment of contract as against the beneficiaries of the contract, to wit, the citizens of the Municipality?

7. Did the City Council and its Mayor in adopting an Ordinance which approves a method of sale of Municipal-owned land, which will enable the purchaser to claim as an exemption the payment of City and County taxes

as to 40 acres of the land being sold, violate the equal protection of the law under the Fourteenth Amendment of the United States Constitution in that it will permit a private corporation to be exempt from its just share of City and County taxation to the detriment of the remaining taxpayers of the Municipality?

Statement.

I. The Ordinance:

The City of Los Angeles adopted an ordinance approving a proposed contract between the Los Angeles Dodgers Baseball Club and the City of Los Angeles. The pertinent provisions of this ordinance, among other things, provides for the following:

(Sec. 1) City to convey to Dodgers 185 acres of land presently owned by City known as Chavez Ravine, and to use its "best efforts" to acquire and convey to the Ball Club additional land to make a total of 300 acres more or less;

(Sec. c) Title to 40 of the 300 acres to be designated by Ball Club to be retained by City for 20 years. In the event Ball Club complies with its policy of maintaining recreational facilities for 20 years, title to such 40 acres is to be conveyed to the Ball Club without further consideration. Ball Club to construct recreational facilities "not to exceed a half million dollars" and to maintain such facilities for 20 years at an annual cost of $60,000.00. Ball Club to have the right to use the 40 acres for parking.

(Sec. d) City agrees to use its "best efforts" to have a public purpose deed restriction eliminated or modified from that portion of the land acquired by the City from the Housing Authority. If City unable

to have such deed restriction eliminated or modified proposed contract to be of "no further force or effect."

(Sec. 3) City is to spend up to two million dollars to place the land in proper condition, the manner in which the money is to be spent to be designated by the Ball Club.

(Sec. 5) Ball Club is to convey Wrigley Field to the City.

(Sec. 6) Ball Club is to construct a baseball stadium.

(Sec. 7) The Ball Club agrees to move its present National League baseball franchise and Brooklyn Dodgers to Los Angeles.

II. The Proceedings in the Superior Court (Case 699077):

Appellant commenced a proceeding in the Superior Court entitled "Petition for Writ of Mandamus; Writ of Prohibition and Declaratory Relief." Appellant sought a writ as follows: (1) directed to the Commissioners of the Housing Authority commanding them to comply with a deed heretofore delivered to the City by the Housing Authority and commanding them to refrain from eliminating the public purpose deed restriction contained therein; (2) directed to the Council of the City commanding them to comply with the deed and to refrain from accepting from the Housing Authority any instrument purporting to eliminate the public purpose deed restriction now in effect against said land; (3) directed to the City Clerk and Mayor to refrain from executing a proposed contract between the City and the Ball Club; (4) directed to the Council, Clerk and Mayor to refrain from carrying out the ordinance.

The following grounds among others were alleged in the petition as grounds of invalidity:

1. That the City did not have the power under its charter to sell or convey to a private corporation land held subject to a public purpose deed restriction.

2. The City could not agree to remove a public purpose deed restriction on land heretofore acquired by the City subject to such a restriction.

3. The City could not agree to purchase land for the benefit of a private corporation.

4. The City could not adopt a method of sale of municipal owned lands which would enable the purchaser to become exempt from real property taxes and to be able to claim as a state and federal tax deduction the payments made toward the purchase price.

5. The City could not delegate to a private corporation the manner in which two million dollars of municipal funds shall be spent.

6. The Council was guilty of an abuse of legislative discretion in declaring that land was no longer required for the use of the City when the ordinance on its face approving the sale of such land showed that 40 acres were required for the use of the City and was to be used by the City.

In supporting points and authorities attached to the petition filed in the Superior Court, Appellant alleged that the attempted exercise of the provisions of the contract that the City was to use its best efforts to extinguish the public purpose deed restriction so that the City could convey said land to the Baseball Club free of such restriction would violate Article I, Section 10, of the United States Constitution as an attempted impairment

of contract. (Original petition Superior Court case No. 699077, page P. A. 30.)

In a trial brief filed pursuant to a pre trial court order Appellant similarly contended among other things that a municipality cannot alienate its interest in property held subject to a public purpose deed restriction—that such an alienation would constitute an impairment of contract in violation of Article I, Section 10, of the United States Constitution.

Appellant alleged in his trial brief that both the escrow instructions and the deed to the City from the Housing Authority were executed contracts which fixed and limited the rights of the parties including the rights of the taxpayers for whose benefit the land was purchased. (Trial brief, pages F 25-26-27 attached to Brief of Louis Kirshbaum in opposition to application for prohibition.)

III. The Legal Effect of the Ordinance:

By its Ordinance the Council of the City of Los Angeles did the following:

(a) Approved the expenditure of tax funds for the purpose of acquiring and conveying land to a private corporation engaged in a private enterprise for its private profit.

(b) It approved the sale and conveyance of land acquired subject to a public purpose deed restriction, to a private corporation without limitation as to its intended use.

(c) Approved the delegation to a private corporation engaged in a private enterprise for its private profit the unlimited power to determine the manner in which $2,000,000.00 of tax funds may be spent.

(d) Approved the extinguishment of a public purpose deed restriction, thus constituting an impairment of contract as against the beneficiaries of the contract, to wit, the citizens of the municipality.

(e) Approved a method of sale which will permit the Los Angeles Dodgers to claim exemption from the payment of City and County taxes as to 40 acres of the land being sold, thus violating the equal protection of the law under the Fourteenth Amendment to the United States Consitution.

IV. The Decision of the Superior Court in Case 699077:

The Superior Court in Case number 699077 rendered judgment declaring the ordinance and contract to be illegal and void; the court making the following findings among others:

(1) The recital in the ordinance that the land is no longer required for the use of the City is a manifest abuse of discretion which appears on the face of the proposed contract.

(2) The recital the City is in the process of acquiring additional property and such property is no longer required for the use of the City evidences an intention on the part of the City to continue with the process of acquiring lands for which the City as such has no public use solely for the purpose of conveying it to a private corporation for private use, is an abuse of discretion and an illegal expenditure of public funds for a private purpose.

(3) That part of the ordinance and proposed contract wherein it is provided that the City "will use its best efforts to acquire . . . and convey additional land, to make a total of 300 acres more or less—to

Ball Club, or Nominee," is void as involving the illegal use of public funds, a manifest abuse of discretion, and *ultra vires* as beyond the power of the City.

(4) The provision of said proposed contract: "Prior to passage of title to any of the acreage described in paragraph 1, City shall spend up to but not to exceed $2,000,000 to place such property in a proper condition to convey to Ball Club or its nominee, the manner in which such money will be spent for such purpose to be designated by Ball Club" constitutes an illegal delegation of the duty of the City Council, an abdication of its public trust, and a manifest gross abuse of discretion.

(5) The agreement of the City found in paragraph 2 of said proposed Contract: "Upon conveyance of such property to Ball Club, the existing public streets therein which would no longer be needed for present or future street purposes will be vacated and the City shall, upon demand of the Ball Club, commence proceedings to vacate said streets and deliver any title which may remain in the City without further consideration," is *ultra vires* and an abuse of discretion.

The trial court concluded (in case 699077) that Appellant Louis Kirshbaum (and Co-Appellant Julius Ruben) were each entitled to judgment as follows:

(a) Declaring said Ordinance No. 110,204, and said proposed contract contained therein to be illegal and void.

(b) Enjoining and restraining the respondents Walter C. Peterson, in his official capacity as City Clerk of the City of Los Angeles, The City of Los

Angeles, a Municipal corporation, Norris Poulson in his official capacity as Mayor of the City of Los Angeles, and the City Council of the City of Los Angeles, and the members thereof, from:

(1) Executing said proposed contract set forth in said Los Angeles Ordinance No. 110,204 between the City of Los Angeles and the Brooklyn National League Baseball Club, Inc.

(2) Conveying, pursuant to said ordinance and said proposed contract authorized thereby, to the Brooklyn National League Baseball Club, Inc., or its nominee, the land involved and partially described in and contemplated by said proposed contract and ordinance.

(3) Carrying out the provisions of said Ordinance No. 110,204, or said proposed contract therein set forth, or any part thereof; provided, that nothing herein contained shall be construed to prevent said City and its said officials from acquiring lands or other properties in the exercise of its municipal functions and without regard to the provisions of said proposed contract as purportedly authorized by said Ordinance No. 110,204.

V. The Referendum Case (Superior Court Number 703023):

During the pendency of the first two taxpayers' suits, 699077, and 687210 a third suit was filed to enjoin certification of a referendum election approving the ordinance and contract. The trial court successively in Case 703023 thereupon granted a restraining order and temporary injunction enjoining certification of the referendum election pending a decision on the first two cases on the merits. After the trial court announced its decision declar-

ing the ordinance to be invalid, counsel for Appellant was directed to prepare and submit to the court findings of fact, conclusions of law and a judgment. Although the Appellees had orally stipulated with the trial judge that the judgment on the referendum case could follow the judgment on the first two cases, after the trial court released his memorandum decision declaring the ordinance to be invalid and while the findings of fact were being prepared for presentation to the trial judge, the Appellees filed a petition with the State Supreme Court applying for a writ of prohibition to enjoin further proceedings in the referendum case, and to declare the ordinance to be valid.

In points and authorities filed in the referendum case (Case number 703023) Appellant among other things alleged that the proposed sale of the land to the Dodgers would constitute an impairment of obligation of contract in violation of Article I, Section 10, of the United States Constitution (points and authorities Point IV, Appendix C.) Appellant additionally alleged that any action taken by a municipality to abandon a public use of property conveyed to a municipality subject to a public use restriction would constitute an impairment of contract in violation of both State and Federal Constitutions, appellant citing Article I, Section 10, of the United States Constitution, and Article XI, Section 16, of the Constitution of California. (Points and authorities in support of plaintiff's application for a temporary restraining order, Appendix C.)

Appellant alleged that neither the Council nor the voters in a referendary election could approve a contract which would violate the foregoing provisions of the United States and State Constitutions with respect to impairment of contract obligations.

VI. The Prohibition Proceedings (The Appeal in the State Court):

In the prohibition proceedings the Appellees requested the State Supreme Court not only to enjoin further prosecution of the referendum case but also to make a final determination of the legality of the contract, it being alleged the remedy of an appeal from the adverse decisions announced by the trial judge in case 699077 were neither speedy nor adequate.

The Supreme Court first issued an alternative writ of prohibition. At the hearing held before the Supreme Court on the return date of the alternative writ, Appellant among other contentions argued that if in the determination as to whether the contract was a valid one evidence would be required on any question of fact, prohibition by the Supreme Court would constitute a denial of due process of law. [Rep. Tr. of Argument, case L. A. 25113, held before Supreme Court, Appendix D.]

The Supreme Court of California directed counsel in the respective cases to file briefs showing the questions of fact which it is claimed must be resolved in order to determine the validity of the contract. [Rep. Tr. of Argument before Supreme Court, Appendix D.] Thereafter counsel for appellant filed a brief entitled Brief of Respondent Louis Kirshbaum in Opposition to Application for Prohibition.

In that brief appellant set forth the following questions of fact as constituting questions of fact which were in issue in the original Kirshbaum case 699077 and were in issue in the Referendum case No. 703023:

1. Whether all or any part of the land the City agrees to convey to the Ball Club under the terms of the ordinance was no longer required for the use of the City.

2. Whether the City Council made any investigation to determine if the land the City agrees to convey to the Ball Club was no longer required for the use of the City.

3. Whether the Council had complied with Section 393 of the Charter.

4. Whether the Council was attempting to extinguish the restriction "to be used for public purposes only" contained in the deed conveying the land to the City from the Housing Authority.

5. Whether it was the intent of the parties to the proposed contract to exempt the Ball Club from payment of real property taxes on 40 acres of the land for 20 years.

6. Whether it was the intent of the parties in granting to the Ball Club control over the expenditure of $2,000,000.00 of municipal funds to enable the Ball Club to pave its parking lot at public expense.

7. Whether the City was proceeding to acquire with public funds land from private owners for the purpose of conveying the land to be acquired to the Ball Club, a private corporation, and to do so without any additional consideration.

Appellant in his brief to the Supreme Court of California set forth the evidence offered in the trial court which established that there were questions of fact upon whch appellant (herein) was entitled to findings. (Brief of Respondent Louis Kirshbaum in opposition to application for prohibition pp. 7-46.) Appellant then made the following contentions among others in his brief in opposition to the prohibition:

One. Prohibition directed against an injunction granted by the Superior Court will not lie where the

plaintiffs are entitled to findings on material issues of fact. (Brief of Respondent Louis Kirschbaum, pp. 50-54.;

Two. If in the determination as to whether the proposed contract is valid, evidence was required on any question of fact, prohibition by the Supreme Court would constitute a denial of due process of law. (Brief of Respondent Louis Kirshbaum, pp. 54-58.)

Three. It is a general rule that prohibition will not lie where the right of appeal exists from the judgment of a separate case. (Brief of Respondent Louis Kirshbaum, pp. 58-60.)

Four. It is against public policy for a municipality to approve an agreement obligating the City to purchase land for the purpose of conveying said land to a private corporation engaged in an enterprise for private profit. (Brief of Respondent Louis Kirshbaum, pp. 61-62.)

Five. The Court was required to take judicial knowledge of the Charter and therefore to permit the appellants to show that the City had not complied with Section 393 of the Charter. (Brief of Respondent Louis Kirshbaum, pp. 63-64.)

In further response to the application for prohibition, appellant argued that irrespective of the omission of the Charter to prohibit certain acts, a municipality could not lawfully adopt a legislative act which would impair the obligation of a contract, nor could it make a gift of public funds. That neither an individual nor a municipality can hide behind a contract which has enabled the other party to evade his lawful obligation for either County or Federal taxes. (Brief of Respondent Louis Kirshbaum, pp. 71-74.)

Appellant attached a copy to his brief of the points and authorities filed by him with the Superior Court in Case 703023 (Appendix C).

Appellant made the following additional contentions in his brief in opposition to the application for prohibition:

One. A determination as to the necessity for the sale or exchange of land is vested exclusively in the City Council and is not subject to a referendary vote. (Brief of Respondent Louis Kirshbaum, pp. 82-83.)

Two. The sale of land acquired and held by a municipality subject to a public purpose deed restriction may not be submitted to the voters in a referendary election. That land acquired by deed subject to a public purpose restriction is inalienable by the municipality and cannot thereafter be sold by the municipality to private interests in violation of the terms of the deed of conveyance. (Brief of Respondent Louis Kirshbaum, pp. 83-84.)

Three. That the implied power of a municipality to abandon a public use in municipally owned land is limited to land acquired by the City unconditionally and of which it holds the full title without a public purpose deed restriction. (Brief of Respondent Louis Kirshbaum, p. 85.)

Four. The Housing Authority does not have the power to extinguish the public purpose restriction in the land it sold to the City of Los Angeles. (Brief of Respondent Louis Kirshbaum, p. 85.)

Attached to the brief as Appendix F was a full copy of appellant's trial brief filed with the Superior Court in Case 699077. Both the points and authorities filed in case 703023 and the brief in case 699077 as heretofore stated raised the point that the sale contemplated by the City of Los Angeles to the Ball Club would constitute an

impairment of obligation of a contract in violation of Article I, Section 10, of the United States Constitution. (Brief of Respondent Louis Kirshbaum, pp. F17, F25.)

In the trial brief, appellant after arguing that the attempted alienation of land held subject to a public purpose deed restriction would constitute an impairment of contract in violation of Article I, Section 10, of the United Stated Constitution, then argued, "Both the escrow instructions and the deed to the City from the Housing Authority were executed contracts which fixed and limited the rights of the parties including the rights of the taxpayers for whose benefit the land was purchased. (Brief of Respondent Louis Kirshbaum, pp. F25-26.)

The Supreme Court of California, without passing on the question as to the general jurisdiction of a Superior Court to enjoin certification of an election, granted a peremptory writ of prohibition restraining the Superior Court from taking any further action to enjoin certification of the result of the referendum election, *i. e. to try the case on the merits.* The Supreme Court after acknowledging the judgment rendered in Superior Court Cases 699077 and 687210, and that appeals were then pending before it, proceeded in the prohibition proceedings to render a further decision as to the validity of the ordinance, *without waiting for the briefs to be filed in the appeals in cases 669077 and 703023.*

The Supreme Court disposed of appellant's objection that prohibition by the Supreme Court would constitute a denial of due process of law by declaring:

> "Although prohibition should not issue where the propriety of the trial court's action depends upon questions of fact, none of the persons attacking the

contract has pointed to any evidence which would present a substantial question of fact upon a material issue."

Appellant duly filed a petition for a rehearing raising the following constitutional questions hereinabove set forth. The Supreme Court without opinion denied the petition for a rehearing.

Subsequently, the Supreme Court rendered a separate decision in Superior Court Cases 699077 and 687210, reversing said judgments on the basis of the doctrine of the law of the case and limited appellant to the issue of the validity of the public purpose deed restriction.

A separate appeal has been taken from that decision to this Court and the record will be filed with the Supreme Court within the time allowed by law.

The Federal Questions Are Substantial.

1. In Granting Prohibition the Supreme Court of California Denied Appellant Due Process of Law.

Appellant has raised a question of judicial interference by the issuance of a writ of prohibition which strikes at the very essence of due process of law. There could hardly be a more extreme case of an unconstitutional usurpation of power by judicial act than in the case now before the Court. If the Supreme Court of California may, without the staying hand of the United States Supreme Court, continue to grant prohibition against its superior courts under circumstances comparable to the facts in this case, then trial by Superior Court as a matter of right has been abolished in the State of California.

In *Saunders v. Shaw*, 244 U. S. 317, it was held that a decree rendered by the Supreme Court of Louisiana

without a trial upon an issue of fact in the trial court deprived an intervenor of his property without due process of law because the case had been decided against him without his having had an opportunity to present his evidence.

In *Georgia v. Decatur*, 295 U. S. 165, 171, the Supreme Court said, "The refusal of a court to receive or consider any proof whatsoever on the subject amounts to a denial of a hearing on that issue in contravention of the due process clause of the Constitution." (Citing *Saunders v. Shaw*, 244 U. S. 317, 319; *Bandini v. Superior Court of Los Angeles County*, 284 U. S. 8, 19.)

Two closely related constitutional questions are raised by appellant. In both, appellant contends that the Supreme Court of California in granting prohibition denied appellant due process of law.

The two questions are:

Did the Supreme Court of California act unconstitutionally, in violation of the Fourteenth Amendment to the United States Constitution, by (a) denying appellant a trial in the Superior Court, and (b) by denying appellant an opportunity to present evidence or disputed questions of fact to a trial court, thereby depriving appellant of due process of law?

In the present case, the Superior Court, proceeding under its constitutionally granted powers, had granted temporary injunctive relie in the referendum case until it could hear the case on its merits or render a decision on the merits on the first two suits challenging the validity of the ordinance. After the Court had completed the first two cases and had announced judgment against the defendants, prohibition was then granted by the Supreme

Court to prohibit the Superior Court from hearing the referendum case. This prohibition was granted, not on the grounds that the Superior Court lacked jurisdiction to hear a referendum case, but solely on the grounds that the ordinance which the Superior Court had determined to be invalid was, in the opinion of the Supreme Court, *valid on its face.*

Appellant argued that to extend the application of prohibition to this case would invade the constitutionally granted powers of the Superior Court to hear the referendum case on its merits and would divest it of its constitutionally granted jurisdiction.

Appellant argued that prohibition would deny the Superior Court the right to grant a temporary injunction until the Court could determine the validity of legal issues of both law and fact which were within its exclusive province to determine.

Appellant argued that prohibition would deny to appellant the due process of the law, namely, a full hearing on the merits, and the right to a decision on the merits by a court vested with the power to determine the questions of law and fact involved.

Appellant argued that prohibition would permit an indirect attack on the findings and judgment of a trial court in a completed case involving disputed questions of fact.

Appellant argued that prohibition would permit the judgment in the bases already completed to be indirectly attacked while the right of appeal existed and was being taken.

Appellant argued that prohibition would divest the Superior Court and appellant of fundamental rights guaranteed under the State and Federal Constitutions, and that

the granting of prohibition would arbitrarily ignore these rights.

The Supreme Court of California, without deciding that the Superior Court lacked the power to hear a case involving a referendary election, proceeded by indirection to deprive appellant of the right to present, in the referendary case, evidence to further establish the illegality of the ordinance now before this Court.

Appellant in opposition to the application for prohibition and again in a petition for a rehearing argued that the Superior Court had jurisdiction to hear the evidence and decide the issue of fact and law, and that the appellees had not at any time sought to prohibit the trial of the cases in chief; that after participating in a trial of the cases in chief and arguing every legal ground available they were now seeking to accomplish indirectly in the referendum case that which they could not do directly in the first two cases on the merits.

It is well established that action by a state court is proscribed by the due process clause of the Fourteenth Amendment of the United States Constitution. It is also clearly established that the action of a state court in denying a litigant a full opportunity to present competent evidence constitutes a denial of due process of law.

The California Supreme Court apparently acted on the erroneous assumption that the only question for it to determine as whether there were questions of fact in Superior Court case No. 699077. This overlooked the fact that appellant could offer evidence, and intended to offer evidence, in the referendum case that had heretofore been offered in case No. 699077, and in addition could, and intended to, offer additional evidence in the referendum case.

Appellant argued in his brief in opposition to prohibition (pp. 48-49) that the State Supreme Court "in determining whether there were questions of fact before the trial court in case No. 699077 which would preclude the remedy of prohibition, should give consideration not only to the evidence introduced, but to the evidence improperly excluded, and which evidence could properly be introduced in the referendum case No. 703023." *In granting prohibition, the State Supreme Court foreclosed the opportunity to present such evidence.*

The State Supreme Court in granting prohibition acknowledged that prohibition should not issue where the propriety of a trial court's action depended upon questions of fact. The Court then summarily concluded that none of the persons attacking the contract had pointed to any evidence which would present a substantial question of fact upon a material issue.

The appellant takes issue with the decision of the State Supreme Court holding that the appellant has failed to point to any evidence which would present a substantial question of fact upon a material issue.

It has been held that, although the facts legitimately found by a supreme court of a state are not subject to review by this Court, this does not mean that a state supreme court may, contrary to the record, declare that questions of fact do not exist, when clearly disputed questions of fact do exist. (*Merchants v. Richmond*, 256 U. S. 635, 638; *Postal v. Newport*, 247 U. S. 464, 473.)

Appellant, in his Brief in Opposition to Prohibition, set forth the following, among others, questions of fact which were properly in issue in the case:

1. Whether the land to be sold was no longer required for the use of the City.

2. Whether the City Council made an investigation, as required by the City Charter, to determine whether the land was no longer required for the use of the City.
3. Whether the City Council had complied with the Charter.
4. Whether the City was attempting to extinguish the public purpose deed restriction.
5. Whether it was the intent of the parties to the contract to exempt the Ball Club from payment of certain real property taxes.
6. Whether it was the intent of the parties to the contract in granting the Ball Club control over expenditure of two million dollars of City tax money to enable the Ball Club to pave its private parking lot at public expense. (Brief in Opposition to Prohibition, pp. 3-6.)

Evidence was offered in the trial court on all of the above issues of fact in case No. 699077. (Brief in Opposition to Prohibition, pp. 7-46.)

The California Supreme Court, after concluding that the foregoing matters were not *questions of fact*, proceeded to issue prohibition under the following circumstances:

1. *It did not* determine the jurisdictional question of whether a superior court may enjoin certification of the results of a referendary election.

2. *It did not* pass on the constitutional right of the appellant to have the Superior Court hear and determine issues of fact and law raised in case No. 703023.

3. *It did not* pass on the question of whether appellant had a constitutional right to present to a court of competent jurisdiction evidence in support of appellant's case in addition to the evidence appellant had offered in the case in chief, No. 699077.

4. *It disregarded* its own decisions that:

(a) The Superior Courts of California have the jurisdiction to determine whether or not they have jurisdiction of a matter. (*Murphy v. Superior Court*, 84 Cal. 592; *Fels v. Justice Court*, 28 Cal. App. 2d 740.)

(b) The California Constitution grants the Superior Courts of the State original jurisdiction in all equity matters.

(c) A supreme court of a state has no *nisi prius* jurisdiction in the trial of issues in which question of fact are involved. (California Constitution, Art. VI, Sec. 4; *Agassiz v. Superior Court*, 90 Cal. 103; *County of Sutter v. Superior Court*, 188 Cal. 292 296.)

(d) A supreme court of a state may not grant prohibition in cases involving disputed questions of fact. (*Brock v. Superior Court*, 11 Cal. 2d 682; *Agricultural Prorate Commission v. Superior Court*, 5 Cal. 2d 550.)

(e) The determination of questions of fact in a trial court is conclusive upon a reviewing court in a prohibition proceeding. (*Conlon v. Superior Court*, 12 Cal. App. 420; *Lumas v. Superior Court*, 89 Cal. App. 384, 388.)

(f) When a superior court has power to determine a jurisdictional fact, its determination cannot be juris-

dictionally attacked by an application for a writ of prohibition.

Mills Music v. Lampton, 40 Cal. App. 2d 354, 358;
Beaulieu v. Superior Court, 6 Cal. App. 2d 242;
Greenbaum v. Superior Court, 189 Cal. 741;
Finkle v. Superior Court, 71 Cal. App. 97;
Lumas v. Superior Court, 89 Cal. App. 384;
Murphy v. Superior Court, 84 Cal. 592;
Mines v. Superior Court, 91 Cal. 101;
Lange v. Superior Court, 11 Cal. App. 1;
Ex parte Oklahoma, 220 U. S. 191, 208;
Hogan v. Superior Court, 74 Cal. App. 708.

(g) A writ of prohibition is not available to restrain the commission of error.

Colma v. Superior Court, 75 Cal. App. 91;
Coker v. Superior Court, 58 Cal. 177;
Johnston v. Superior Court, 4 Cal. App. 90;
Cooke v. Superior Court, 73 Cal. App. 744;
Van Hoosear v. Railroad Com., 189 Cal. 228;
Cullinan v. Superior Court, 24 Cal. App. 2d 468;
Wreden v. Superior Court, 55 Cal. 504;
Felton v. Superior Court, 82 Cal. App. 382, 389.

In *Rescue Army v. Municipal Court*, 28 Cal. 2d 460, 473, Justice Carter, in a dissenting opinion, said in quoting from 21 Corpus Juris Secundum, Courts, 113, "Every court has judicial power to hear and determine, or inquire into, the question of its own jurisdiction, both as to parties and as to subject matter, and to decide all questions, whether of law or fact, the decision of which is necessary to determine the question of jurisdiction. And as a necessary

corollary to that proposition it has jurisdiction to decide the jurisdictional question wrongly as well as rightly."

Appellant does not dispute the power of the Supreme Court of California in an appropriate case to grant prohibition to test the validity of an ordinance, but appellant does contend, as stated in the case of *County of Sutter v. Superior Court*, 188 Cal. 292, that such a writ can only be used to arrest proceedings of a superior court which "are without or in excess of" its jurisdiction; Appellant further contends that the Superior Courts of the State of California, in the words of Justice Carter, do have the judicial power to hear and determine, or inquire into, the question of its jurisdiction, both as to parties and as to subject matter, and to decide all questions, whether of law or fact, the decision of which is necessary to determine the question of jurisdiction. Stated within the framework of this case, it is the contention of the appellant that the Superior Court in the case at bar had the jurisdiction to determine whether certification of the referendum election should or should not be enjoined, and that it had the power to determine that question wrongly as well as rightly.

The California Supreme Court has repeatedly recognized that the Superior Courts of California do have such jurisdictional power.

Portnoy v. Superior Court, 20 Cal. 2d 375;
In re Bell, 19 Cal. 2d 488;
Truck Owners v. Superior Court, 194 Cal. 146;
Morehouse v. Superior Court, 124 Cal. App. 38.

To permit the decree in prohibition in this case to remain unchallenged will serve only as encouragement for further invasion of the constitutional powers of the Su-

perior Court and, in turn, the unconstitutional enlargement of the powers of the Supreme Court of California and, as a necessary corollary, the continuation of new and additional deprivations of the due process of law which all persons in the State of California are entitled to receive.

2. The Ordinance Contravenes the Contract Clause of the Constitution of the United States.

Appellant both in the Superior Court and before the Supreme Court of California raised the contention that the City of Los Angeles had adopted an ordinance which impairs the obligation of a contract. The deed to the City of Los Angeles from the Housing Authority is a contract within the protection of Article I, Section 10, of the United States Constitution.

Wood v. Lovell, 313 U. S. 369;
Fletcher v. Peck, 10 U. S. 87;
Davis v. Gray, 83 U. S. 232;
Charles River v. Warren Bridge, 36 U. S. 573;
Dartmouth v. Woodward, 17 U. S. 654.

The escrow instructions through which the City of Los Angeles acquired title to said land similarly constituted a contract. *Todd v. Vestermark*, 145 Cal. App. 2d 374, 378. The purchase of the land from the Housing Authority subject to a public purpose deed restriction was authorized by ordinance which approved the deed restriction. It is well established that a later ordinance involving vested contractual rights, which attempts to repeal an earlier ordinance, contravenes the contract clause of the United States Constitution. (*City of Cleveland v. Cleveland Ry. Co.*, 194 U. S. 517; *Louisville v. Cumberland Telephone*,

Co., 224 U. S. 649, 664; *Davis v. City of Los Angeles*, 189 U. S. 207, 216; *Boise Water Co. v. Boise City*, 230 U. S. 84.)

Federal jurisdiction attaches when a state supreme court has approved an ordinance which impairs the obligation of a contract. (*Columbia v. South Carolina*, 261 U. S. 236, 244; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 578; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 81, 82, 83; *Walla Walla v. Walla Walla*, 172 U. S. 1.)

The Supreme Court of California without citing a single legal precedent has concluded that a grantor of a deed may extinguish a deed restriction by issuing a second deed. This decision is in conflict with the prior Supreme Court decisions of the State of California. It is in conflict with the decision of the highest courts of other states and of the United States. And, of course, it is in conflict with Article I, Section 10, of the United States Constitution.

These decisions clearly hold that a conveyance of land cannot be qualified by any act or declaration thereafter made on the part of the grantor.

Slavich v. Hamilton, 201 Cal. 299;
Watson v. Eldridge, 207 Cal. 314;
Carstens v. Wood River, 332 Ill. 400;
Also cited in 63 A. L. R. 471;
Archer v. Salinas, 93 Cal. 43;
Schultz v. Beers, 111 Cal. App. 2d 820;
Washington v. Los Angeles, 38 Cal. App. 2d 135;
United States v. Illinois Central R.R., 154 U. S. 225;
Fletcher v. Peck, 10 U. S. 87.

The Supreme Court has misconstrued Section 34315 of the Health and Safety Code. This section is the statutory power granted to the Housing Authorities to enable them to dispose of any real or personal property owned by them. It was never intended, nor could such provisions be interpreted to mean, that the Housing Authority officials were being given statutory power to issue second conveyances where they had previously parted with all of their right, title, and interest in and to the land.

Were such a purpose and intent contemplated, it would clearly be unconstitutional as authorizing by legislation an impairment of contract in violation of Article I, Section 10, of the United States Constitution.

The Supreme Court of California made a second erroneous conclusion in its construction of the public purpose deed restriction. The pertinent provisions of the deed read as follows:

> "The Housing Authority of the City of Los Angeles . . . does hereby grant . . . to The City of Los Angeles, a Municipal Corporation, *to be used for public purposes only;* and not to be used directly or indirectly by The City of Los Angeles or its grantees, successors in interest, assigns, or any other person or persons whatsoever claiming by, through or under The City of Los Angeles, for a period of twenty (20) years from and after the date hereof for residential development or residential subdivision . . ."

The Court has misconstrued the legal effect to be given to the restriction in the deed.

The first part of the restriction provides that the land is to be used "for public purposes only." Then follows

the phrase "and not to be used directly or indirectly by the City of Los Angeles or its grantees, successors in interest, assigns, or any other person or persons whatsoever claiming by, through or under The City of Los Angeles, for a period of twenty (20) years from and after the date hereof *for residential development or residential sub-division.*"

The latter provisions were intended simply to prohibit the City for a period of twenty years from using the land either directly or indirectly through a grantee or assign, or through any alienation of the title, for "residential development or residential sub-division."

The use of the words "grantees" and "assigns" when read in the entire context, and in relation to the events leading up to the purchase of the land by the City show that the Housing Authority sought to prevent the City from defeating the deed restriction by a resale or conveyance to a third party. Actually, the secondary clause that the land was not to be used for "residential redevelopment" by either the City or by the City's grantee, when read together with such other prohibitory language as "directly or indirectly . . . any other person or persons whatsoever claiming by, through or under The City of Los Angeles," clearly illustrates that the maker of the deed intended by this all-inclusive language to insure that the restriction would not be evaded by the device of a sale or conveyance to a third party, rather than an intention to authorize any such sale.

There is still an additional reason which supports appellant's contention that the Supreme Court has misconstrued the legal effect of the public purpose deed restriction. By statute it is provided that an interpretation should be made of the conditions in a deed which would

give effect to the provision, rather than one which would make it void. Calif. Civil Code, Section 3541.

Section 1067 of the Civil Code provides:

> "*Limitations in grant.* LIMITATIONS, HOW CONTROLLED. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct."

Section 1070 of the Civil Code provides:

> "*Irreconcilable parts.* IRRECONCILABLE PROVISIONS. If several parts of a grant are absolutely irreconcilable, the former part prevails."

Conclusion.

An injustice has been inflicted upon the taxpayers of Los Angeles for whose benefit this action has been brought.

With indifference to the constitutional limitations of the Fourteenth Amendment and of Article I, Section 10 of the United States Constitution an ordinance has been approved which will hand over to a private corporation engaged in a private venture for its own private profit 169 acres of land in disregard of a public purpose deed restriction.

That this land is inalienable and its conveyance constitutes an impairment of contract prohibited by the United States Constitution has been ignored.

Under a mistaken theory of the law the Supreme Court of the State by its decision has indicated its willingness to condone the violation of these constitutional prohibitions.

Must the laws be trampled upon, and the legal rights of its citizens destroyed to make the entrance of a baseball club possible? Will not others claim with equal impunity

that they too are entitled to the same exception now so generously heaped upon a baseball corporation?

The case is worthy of the consideration of the highest Court of the nation, to receive full briefs and to permit full argument.

Respectfully submitted,

PHILL SILVER,

Attorney for Appellant Louis Kirshbaum.

APPENDIX A.

Opinion of the California Supreme Court.

[L. A. No. 25113. In Bank. Jan. 13, 1959.]

The City of Los Angeles *et al.*, Petitioners, v. The Superior Court of the County of Los Angeles *et al.*, Respondents; Los Angeles Dodgers, Inc. (a Corporation) *et al.*, Real Parties in Interest.

Proceeding in prohibition to restrain the Superior Court of Los Angeles County from enforcing a preliminary injunction or taking further action in a taxpayer's suit to enjoin certification of the result of a referendum election. Writ granted.

Roger Arnebergh, City Attorney, Bourke Jones, Assistant City Attorney, and Weldon L. Weber, Deputy City Attorney for Petitioners.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Assistant County Counsel, for Respondent.

Joe Crider, Jr., O'Melveny & Myers and Pierce Works for Real Party in Interest Los Angeles Dodgers, Inc.

Julius Ruben, in pro. per., and Phill Silver for Real Parties in Interest Ruben and Kirshbaum.

GIBSON, *C. J.*—By this proceeding in prohibition the city of Los Angeles seeks to restrain the superior court from enforcing a preliminary injunction or taking further action in a taxpayer's suit to enjoin certification of the result of a referendum election.

The city council adopted an ordinance authorizing execution of a contract between the city and the Brooklyn National League Baseball Club, Inc., which provided, among other things, for the exchange of certain properties and for the ball club to erect a stadium and procure

the transfer from Brooklyn to Los Angeles of the franchise of the major league baseball club known as the "Dodgers." Following the filing of a referendary petition, the city council voted to place the ordinance on the ballot for approval or disapproval by the voters, and at the ensuing election a majority of the voters favored adoption of the ordinance. Thereafter respondent superior court granted a temporary restraining order and a preliminary injunction restraining the city council from declaring the result of the election.

Two prior actions were filed by some of the real parties in interest. One was brought to secure a declaration that the ordinance and contract were invalid and to enjoin any proceedings thereunder (Ruben v. City of Los Angeles, L. A. Superior Court No. 687210); in the other similar relief was sought together with mandamus and prohibition (Kirshbaum v. Housing Authority, L. A. Superior Court No. 699077). Judgments were rendered enjoining the execution of the contract, and appeals therefrom are now pending in this court. In a third action filed by Kirshbaum against the city, a preliminary injunction was issued enjoining certification of the result of the referendum election. (Kirshbaum v. City of Los Angeles, L. A. Superior Court No. 703023.) This proceeding was then brought by the city to prohibit the superior court from enforcing the preliminary injunction or from taking further steps in the third action.

The writ of prohibition is an appropriate remedy to arrest the proceedings of a court when there is not a plain, speedy, and adequate remedy in the ordinary course of the law and when the proceedings of the court are without or in excess of its jurisdiction. (Code Cov. Proc., §§ 1102, 1103.) The absence of another adequate remedy

was determined by this court when we granted an alternative writ. (*Cf.* Atkinson v. Superior Court, 49 Cal. 2d 338, 342 [316 P. 2d 960]; Bowles v. Superior Court, 44 Cal. 2d 574, 582 [283 P. 2d 704].) To permit the issuance of prohibition it is not necessary that there be a lack of jurisdiction over the subject matter or parties in the fundamental sense but only that there be a want or excess of the power of the court as defined by statute or by rules developed and followed under the doctrine of *stare decisis*. (Tide Water Assoc. Oil Co. v. Superior Court, 43 Cal. 2d 815, 821 [279 P. 2d 35]; Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 287 *et seq.* [109 P. 2d 942, 132 A. L. R. 715].)

Subdivision 7 of section 3423 of the Civil Code and the second subdivision 7 of section 526 of the Code of Civil Procedure provide that an injunction cannot be granted to "prevent a legislative act by a municipal corporation." Subdivision 4 of section 3423 of the Civil Code and the second subdivision 4 of section 526 of the Code of Civil Procedure similarly provide that an injunction cannot be granted to "prevent the execution of a public statute by officers of the law for the public benefit." The basis for these statutory provisions is to be found in the doctrine of separation of powers of government into three independent departments. (See Reclamation Dist. No. 1500 v. Superior Court, 171 Cal. 672, 682 [154 P. 845]; Glide v. Superior Court, 147 Cal. 21, 24 *et seq.* [81 P. 225].)

A court acts in excess of its jurisdiction if it attempts to enjoin the enactment or enforcement of a valid public statute or ordinance. (Financial Indem. Co. v. Superior Court, 45 Cal. 2d 395, 402 [289 P. 2d 233]; Santa Clara County v. Superior Court, 33 Cal. 2d 552, 557-559 [203

P. 2d 1]; Reclamation Dist. No. 1500 v. Superior Court, *supra*, 171 Cal. 672, 676, 681-682; Wheeler v. Herbert, 152 Cal. 224, 241 [92 P. 353]; Glide v. Superior Court, 147 Cal. 21, 23 *et seq.* [81 P. 225]; Loftis v. Superior Court, 25 Cal. App. 2d 346, 352 *et seq.* [77 P. 2d 491]; State Board of Equalization v. Superior Court, 5 Cal. App. 2d 374, 378 [42 P. 2d 1076]; *cf.* Moore v. Superior Court, 6 Cal. 2d 421, 424 [57 P. 2d 1314].) Although prohibition should not issue where the propriety of the trial court's action depends upon questions of fact (Brock v. Superior Court, 11 Cal. 2d 682, 687 *et seq.* [81 P. 2d 931]; Agricultural Prorate Com. v. Superior Court, 5 Cal. 2d 550, 586-587 [55 P. 2d 495]), none of the persons attacking the contract has pointed to any evidence which would present a substantial question of fact upon a material issue. It follows that prohibition will lie to test the validity of the ordinance.

The contract, as set forth in Ordinance Number 110,204, provides that the city will convey to the ball club 185 acres, more or less, of land presently owned by it in Chavez Ravine and will use its best efforts to acquire at a reasonable cost and convey additional land to make a total of about 300 acres, reserving, among other things, an oil drilling site not to exceed five acres, the location of the site to be mutually agreed upon by the parties. Title to 40 acres of the 300, to be designated by the ball club, is to be retained by the city for 20 years to assure performance by the ball club of its obligations to provide and maintain certain recreational facilities during that period, after which title is to be conveyed to the club.

The city is to employ its best efforts to have eliminated or modified a deed provision restricting the use of certain property acquired by the city from the Los Angeles Housing Authority, provided that if the city is unable

to have the restriction altered to permit the use contemplated by the ball club, the contract shall be of no further effect. Upon conveyance of the property to the club, existing public streets therein no longer needed for street purposes will be vacated, and the city, upon demand of the ball club, is to commence proceedings to vacate such streets and deliver title to the club. Prior to passage of title to any of the 300 acres, the city is to spend up to but not to exceed $2,000,000, in the manner to be designated by the ball club, to place such property in a proper condition to convey to the ball club. The city also is to perform certain acts with respect to construction of additional streets, rezoning the property, and obtaining funds from the county for access roads.

The ball club agrees to construct on the Chavez Ravine property, at its expense, a modern baseball stadium seating at least 50,000 people. It will move to Los Angeles "the present Brooklyn National League franchise and ball team known as the 'Dodgers.'" Further, the club will convey to the city the land and improvements known as Wrigley Field, reserving the right to use of the field until the stadium is completed, conditioned upon payment of a rental to be mutually agreed upon.

Recreation facilities costing not over $500,000 are to be constructed by the ball club on the 40-acre portion of the Chavez Ravine property referred to above, such facilities to be mutually agreed upon prior to conveyance of the property. The club is to maintain the recreational facilities on the 40-acre parcel at an annual cost of $60,000, and in the event the maintenance does not amount to that much in any year, the club is to pay the city the difference between $60,000 and the actual cost. The ball club is under no obligation to furnish personnel for the opera-

tion of the recreational facilities, and, with certain exceptions, the city is to have control of them.

In addition, the agreement contains a number of recitals of fact and declarations of policy to the general effect that the contract will be beneficial to the city and that the property which the city now owns and is to convey to the ball club is no longer required for the use of the city.

The city reserves all mineral rights in the Chavez Ravine property, and it is to acquire all mineral rights in Wrigley Field. The agreement directs that one-half of the receipts from the mineral rights is to be placed by the city in a special trust fund and expended solely for the purpose of providing and maintaining recreational facilities to promote the youth program of the ball club, the location and type of facilities to be mutually agreed upon by the parties. The ball club has given formal notice to the city that the club has waived and relinquished all rights conferred upon it under these provisions and has assigned to the city all such rights. The provisions being solely for the benefit of the club, it could properly waive them, and there is no longer any reason to treat them as parts of the contract.

The benefits to be received by the city are apparent, and the adequacy of the consideration, which involves the comparative values of the promises of the parties, is a matter which, in the absence of abuse of discretion, rests in the judgment and discretion of the city council. (*Cf.* Wehrle v. Board of W. & P. Commrs., 211 Cal. 70, 72-73 [293 P. 67]; Nickerson v. County of San Bernardino, 179 Cal. 518, 521 *et seq.* [177 P. 465]; Burns v. American Casualty Co., 127 Cal. App. 2d 198, 206 [273 P. 2d 605].

There is no merit to the argument that the contract lacks mutuality in that there is no absolute obligation requiring the ball club to purchase the 40 acres to be used for recreational purposes or binding it to pay any amount therefor. The contract expressly declares that at the end of the 20-year period during which the ball club is to operate the recreational facilities, title to the 40 acres shall be conveyed to the club "without further consideration" if all the terms of the agreement pertaining to the facilities have been fully performed. The consideration for this conveyance obviously is to be found in the various obligations which must be performed by the ball club whether or not it accepts the 40 acres. The contract likewise is not defective because it provides that a violation of the agreement by the ball club regarding its obligations concerning the recreational facilities will not affect any transfers of land theretofore made. The City is amply protected, in the event of such a default, by the fact that it may continue to retain title to the 40 acres and, in addition, may maintain an action for damages for breach of contract.

The contract is claimed to be void because it contains promises to agree in the future. The general rule is that if an "essential element" of a promise is reversed for the future agreement of both parties, the promise gives rise to no legal obligation until such future agreement is made. (Ablett v. Clauson, 43 Cal. 2d 280, 284-285 [272 P. 2d 753].) The enforceability of a contract containing a promise to agree depends upon the relative importance and the severability of the matter left to the future; it is a question of degree and may be settled by determining whether the indefinite promise is so essential to the bargain that inability to enforce that promise strictly according to its terms would make unfair the enforcement of

the remainder of the agreement. (See 1 Williston on Contracts (3d ed. 1957) §§ 45, pp. 152, 156-158. See also Belcher v. Williams, 151 Cal. App. 2d 615, 620 [311 P. 2d 861].) Where the matters left for future agreement are unessential, each party will be forced to accept a reasonable determination of the unsettled point or if possible the unsettled point may be left unperformed and the remainder of the contract be enforced. (Wilson v. Wilson, 96 Cal. App. 2d 589, 593-595 [216 P. 2d 104]; see 1 Williston on Contracts (3d ed. 1957) § 48, pp. 156-158.)

The contract leaves to the future agreement of the parties the location and size, within 5 acres, of the site to be used for oil drilling, the nature of the recreational facilities to be constructed and maintained for 20 years on the 40-acre parcel, and the rental to be paid to the city in the event the ball club exercises its right to use Wrigley Field prior to completion of the stadium. The reservation of an oil drilling site and the establishment and maintenance of the recreational facilities on the 40-acre parcel are, of course, important features of the contract, but, in our opinion, the uncertainty with respect to the exact location and size of the drilling site and the details with respect to the recreational facilities are matters which should not be treated as rendering the contract void. There is no indication that the city and the ball club are unable to come to an agreement as to them, and, if the parties cannot do so, the court may determine the matters within the test of reasonableness referred to above, in accordance with the general purposes of the contract. Similarly, the court could fix a reasonable rental for Wrigley Field, if this should ever become necessary.

In considering whether the contract made by the city has a proper public purpose, we must view the contract

as a whole, and the fact that some of the provisions may be of benefit only to the baseball club is immaterial, provided the city receives benefits which serve legitimate public purposes (*Cf.* City of Oakland v. Williams, 206 Cal. 315, 319 *et seq.* [274 P. 328]; County of Los Angeles v. La Fuente, 20 Cal. 2d 870, 876-877 [129 P. 2d 378].) The transfer of Wrigley Field from the ball club to the city and the construction by the club on the 40-acre parcel of recreational facilities to be used by the city for 20 years, together with maintenance of the facilities for that period, are obviously for proper public purposes. In view of these direct benefits, it is unnecessary for us to consider whether the city could properly expend public funds for the various indirect benefits which the public will receive under the contract, such as the bringing to the city of a major league baseball club, the construction by the club of its new stadium, and the return of the Chavez Ravine property to the tax rolls.

When the contract is viewed as a whole, there is no actual inconsistency, as argued, between the declaration, on the one hand, that the 185 acres of Chavez Ravine property now owned by the city are no longer required for the use of the city and the recital, on the other hand, that 40 acres of the total of 300 to be conveyed to the club are to be used by the city for needed recreational facilities. The provisions, when read together, may properly be interpreted as meaning that the city has no need for the Chavez Ravine property with the exception of the use of the 40-acre parcel over a 20-year period for the recreational facilities referred to in the contract. As we have seen, the city retains control of and title of that 40-acre parcel for the purpose of obtaining the needed facilities. It is difficult to see anything improper in an agreement by which a city, owning more land than it

needs, conveys some of that land in exchange for the construction and maintenance of needed facilities for use by the city over a 20-year period. It is immaterial that the facilities are to be located on the land which the city thus sells; in fact, under the circumstances involved here; it is of advantage to the city that the facilities are to be so located because this enables the city to retain title for the 20-year period as a means of securing the performance of the promises of the ball club regarding the construction and maintenance of the facilities.

Kirshbaum, in action Number 699077, offered to prove by the testimony of a council member that no steps were taken by the council acting as a body to determine whether the land was no longer required for the use of the city. The offer was rejected by the trial court upon the ground that the minutes of the council are the best evidence until there is a dispute as to their correctness, and our attention has not been called to any portion of the minutes which would support Kirshbaum's assertion or to any evidence that the minutes are incorrect. Moreover, the offered evidence, if admitted, would be insufficient to overcome the declaration in the ordinance that the land to be conveyed by the city was no longer required by the city, since the offer does not show any fraud or abuse of discretion by the council. Likewise insufficient to overcome the declaration are Kirshbaum's offers to prove by the testimony of the general manager of the city's department of recreation and parks that this department was actively seeking and acquiring land to be used for playground and recreational purposes and that the Chavez Ravine property is suitable for such purposes.

In our opinion the city can properly agree that, in return for legitimate benefits which it will receive under the contract, it will use its best efforts to acquire addi-

tional land to convey as part of the consideration to be furnished by it, even though the city is in effect agreeing to purchase land for the purpose of selling it immediately thereafter to a private corporation. If the city had so desired, it clearly could have added to the contract price, in cash, the reasonable value of the additional land which it agreed to use its best efforts to acquire, and there is no essential difference if the city, instead of paying the amount in cash, uses the money to acquire property and then conveys the property as part of the contract consideration. Section 2(11)(1) of the city charter authorizes the city to buy "anything useful or convenient" in connection with the exercise of the city's powers. While a city may not purchase land when no public use or purpose is involved, in the present case the additional land is to be acquired for a proper public purpose, namely, that of furnishing the type of contract consideration which enables the city to enter into a bargain which it deems advantageous. The contract does not require the city to use eminent domain to acquire the additional land, and we need not determine whether that method could be employed for such a purpose. This case does not present the situation of a municipal government which seeks to purchase property for the purpose of making a gift of it to a private enterprise or of otherwise improperly using city funds to aid private persons, because the property which the city is to endeavor to buy, if acquired, will not be given away to anyone but will be used as part of the consideration of a contract entered into for a legitimate public purpose.

It is contended that the city does not have power to sell to a private corporation land held by the city subject to a public purpose restriction imposed by the grantor's deed to the city and that the city has no power to enter

into an agreement with a private corporation obligating the city to extinguish such a restriction. This contention relates to land acquired from the Housing Authority of the City of Los Angeles by a deed containing a restriction reading, in part, "to be used for public purpose only; and not to be used directly or indirectly by the City of Los Angeles, or its grantees, successors in interest, assigns, or any other person or persons whatsoever claiming by, through or under the City of Los Angeles, for a period of 20 years from and after the date hereof, for residential development or residential subdivision." The city, as we have seen, agrees to use its best efforts to have the restriction eliminated or modified to permit the use contemplated by the club, and it is provided that if the city is unable to have the restriction changed, the contract shall be of no further effect.

The grantor did not intend by this provision to prohibit the city from selling the property; the provision contains no such limitation and plainly contemplates the possibility of a sale in that the restriction is made applicable to use of the property by the "grantees" and "assigns" of the city. Under section 393 of the charter, when the city no longer requires the use of property, it may, with certain exceptions not pertinent here, sell the property upon such terms and conditions as the council prescribes by ordinance. In view of the declaration by the council that the city no longer requires the use of the property, the city's promise to use its best efforts to have the deed restriction removed cannot be said to constitute an illegal agreement binding the city council to exercise its judgment in the future. Any possibility that the Housing Authority may have a right to complain of a termination of the public use upon a sale by the city will disappear if

the city is able to obtain the Housing Authority's consent to eliminate the restriction. Similarly, such a consent will obviate any difficulty with respect to the restriction against residential use of the property. Whether or not the Housing Authority has power to execute, and is willing to execute, a release of its rights under the deed restriction is a question which relates to the performance rather than to the validity of the contract and is not before us in this proceeding.

We find no merit to the claim that the city has attempted to make an illegal delegation to a private corporation of the duties of the city council by agreeing that, prior to passage of title, the city shall spend $2,000,000 to place the Chavez Ravine property "in a proper condition to convey to" the ball club, the manner in which the money will be spent for such purpose to be designated by the club. It seems obvious that the city could not be required by the ball club, under this provision, to make any expenditures not in accord with the general purposes of the contract. The city could have paid the money to the club outright, as part of the contract consideration, without retaining any control over the manner or purpose for which the money should be spent, and the arrangement by which the city will keep possession of the money until it is spent and, in addition, retain some control of how it is spent, is an advantage to the city which does not militate against the validity of the contract.

It is contended that the city is illegally agreeing to vacate streets under the provision that the existing public streets in the Chavez Ravine property which will no longer be needed for present or future street purposes will be vacated and the city will, upon demand of the ball club,

commence proceedings to vacate the streets. It is an elementary rule that contracts must be construed, whenever possible, so as to make them valid rather than invalid, and the provision, when read as a whole, may be construed as not imposing on the city any improper obligation. The clear implication is that the agreement will apply only to such streets as the city may subsequently determine to be no longer needed for street purposes. The agreement does not purport to control or govern the exercise of the power to determine what streets may no longer be necessary but to provide that, when the determination is made, the city will commence the required statutory procedure.

It is to the advantage of a city and the public to vacate a street which is no longer needed and thereby relieve the city of the expense and responsibility of maintaining it in proper and safe condition. By this part of the contract the city is merely agreeing to do an act which it should do regardless of contract once it determines that there is no longer a need for a particular street. Cases which declare that agreements to vacate or sell a street are invalid as being attempts to evade the statutory modes of procedure and safeguards or to bind local officials in advance as to the exercise of their judgment in the future, are clearly distinguishable. (See County of San Diego v. California Water etc. Co., 30 Cal. 2d 817, 824 [186 P. 2d 124, 175 A. L. R. 747]; People v. City of Los Angeles, 62 Cal. App. 781 [218 P. 63].)

Ruben asserts, in opposition to the conclusion we have reached with respect to vacation of streets, that we must also consider the paragraph which provides that the city shall spend up to $2,000,000 to place the property in a proper condition to convey to the ball club and that the

manner in which the money is to be spent is to be designated by the club. He urges that this paragraph, when read together with the provision relating to the vacation of streets, has the effect of delegating to the club the power to designate which streets are to be eliminated. The contract, however, does not purport to authorize either the city or the ball club to use any of the $2,000,000 to remove a street where such removal has not been duly authorized in appropriate vacation proceedings. If it should be determined in such a proceeding that a particular street remained necessary for public use as a street, the stadium obviously could not be built at that location, but this possibility does not go to the validity of the contract. At most it might render performance impossible, a matter which is not now before us.

Let the writ issue as prayed.

SHENK, *J.*, CARTER, *J.*, TRAYNOR, *J.*, SCHAUER, *J.*, SPENCE, *J.*, and MCCOMB, *J.*, concurred.

APPENDIX B.

In the Superior Court of the State of California, in and for the County of Los Angeles.

Louis Kirshbaum, Plaintiff, vs. The Housing Authority of the City of Los Angeles, a public body corporate and politic, *et al.*, Defendant. No. 699077.

Memorandum Decision.

This action was instituted by a taxpayer under the provisions of Section 526a of the Code of Civil Procedure. Accordingly the inquiry is limited to a determination of whether or not the performance of the contract by the City would result in "any illegal expenditure of, waste of or injury to, the estate, funds, or other property of" the City, or be *ultra vires,* or a manifest abuse of discretion.

The petition is improperly entitled a "Petition for Writ of Mandate Writ of Prohibition and Declaratory Relief."

However misnomer of a petition or complaint does not prevent the court from granting the relief which the facts and the law show should be granted.

I

On July 1st, 1955, The Housing Authority of the City of Los Angeles conveyed by deed (without warranties) to the City of Los Angeles, 169.62 acres in Chavez Ravine. The consideration paid by the City to the Housing Authority was $1,279,203.00.

The deed (Exhibit E3 to the petition herein) provides that the property is conveyed "to be used for public purposes only; and not to be used directly or indirectly by The City of Los Angeles or its grantees, successors in interest, assigns, or any other person or persons whatsoever claim-

ing by, through or under the City of Los Angeles, for a period of twenty (20) years from and after the date hereof for residential development or residential subdivision;—."

On October 7th, 1957, the City Council of Los Angeles passed Ordinance No. 110204 which ordains: "Section 1. That the City of Los Angeles enter into a contract between The City of Los Angeles, a Municipal Corporation, and the Brooklyn National League Baseball Club, Inc., a New York Corporation, in words and figures as follows:

"The first three recitals in the contract are:

"Whereas, the City is the owner of certain property in an area generally known as Chavez Ravine, and is in the process of acquiring additional property in said area; and

Whereas, such property is no longer required for the use of the City; and

Whereas, the bringing of major league baseball to Los Angeles would result in direct and indirect benefits to the City and would be highly beneficial to the city, to the public, and to its inhabitants to have such property the site of a major league baseball stadium."

Then follow recitals to the number of fifteen.

It is stipulated that the eighth recital relating to the Ball Club constructing recreational facilities is in fact a covenant on the part of the Ball Club.

At the conclusion of the recitals paragraph 1 provides: "City will convey the property presently owned by it in Chavez Ravine consisting of 185 acres, more or less, and will use its best efforts to acquire, at a reasonable cost, and convey additional land, to make a total of 300 acres, more or less, all as shown in Exhibit A, to Ball Club, or nominee; . . .".

Exhibit A is a map showing the boundaries of the lands proposed to be conveyed, and the land within the boundaries owned by the City, property not owned by the City, Park Property and a Reservoir Site.

The 169.62 acres deeded to the City by the Housing Authority are part of the 185 acres stated to be "presently owned" by the City and to be conveyed to the Ball Club.

Paragraph 1(d) provides:

"All property herein agreed to be conveyed by City, including said 40 acres, will be conveyed free and clear of any deed restriction on use, and title policy shall be furnished to Ball Club. In this connection, it is expressly understood and agreed that the portion of property described in paragraph 1 now owned by the City and which was acquired by City from the Los Angeles Housing Authority has a deed restriction reading, in part, as follows:

"To be used for public purposes only; and not to be used directly or indirectly by the City of Los Angeles, or its grantees, successors in interest, assignees, or any other person or persons whatsoever claiming by, through or under the City of Los Angeles, for a period of 20 years from and after the date hereof, for residential development or residential subdivision."

City agrees to use its best efforts to have such deed restrictions eliminated or modified so as to permit the use contemplated by Ball Club; provided that in the event City is unable to have such restriction so eliminated or modified, this contract shall be of no further force or effect."

Petitioner asserts (Petitioners P and A to petition points II to V inclusive), (a) that this is an unlawful agreement on the part of the City, in that as the 169.62

acres were conveyed to the City "for public purposes only" it must be used for public purposes only and cannot be sold to a private corporation for private use.

(b) Petitioner also contends that when the Housing Authority executed the deed it "parted with all its right, title and interest in the land and particularly no right remained in the Housing Authority to extinguish the deed restriction by a subsequent deed."

Respondents contend "that in order to sustain petitioner's contention it would have to appear that the language employed in the deed created a dedication for a public use of such nature that would give this taxpayer a right as a third party to enforce the same and that such dedication was of an irrevocable nature.—[and] that no such dedication exists in this case."

Regarding (a) All property acquired by a municipality is for a public purpose, whether the use is in its governmental or proprietary capacity.

The deed in this case does not specify any particular public use. Sale and conveyance of the property by the City was contemplated by the grantor when it placed in the deed the twenty year restriction against residential development or residential subdivision.

This would seem to indicate an intent on the part of the grantor not to limit the use of the property "for public purposes only."

"The intent of the grantor is to be gathered from a consideration of the entire instrument of conveyance, although the immediate object of inquiry is the meaning of an isolated clause." (Slavich v. Hamilton, 201 Cal. 299 at p. 304.)

It seems to be the general rule that where a private party conveys land to a municipality for a definite public purpose it cannot be diverted to another and different purpose, "At least so long as the conditions of the grant are in force." But that a different rule applies if no definite purpose is specified in the deed or the property is acquired by purchase or condemnation. (See Ritzman v. City of Los Angeles, 38 CA 2d 470; City and County of San Francisco v. Linares, 16 C. 2d 441.)

In Slavich v. Hamilton, 201 Cal. 299, the court said at page 303:

"The uses to which park property may be devoted depend to some extent upon the manner of acquisition, that is whether dedicated by the donors, or purchased or condemned by the municipality. A different construction is placed upon dedications made by individuals from those made by the public. The former are construed strictly according to the terms of the grant, while in the latter cases a less strict construction is adopted."

In addition to this it may be questioned whether a valid condition subsequent was created. (See Fitzgerald v. County of Monoc, 164 Cal. 493.)

Section 393 of the City Charter provides:

"Any real property owned by the City of Los Angeles that is no longer required for the use of the City may, subject to the limitations and exceptions elsewhere prescribed in this Charter, be sold, either in whole or in part, under such terms and conditions, and under the procedure as the Council may by ordinance prescribe; provided, however, that any real property proposed to be sold that is under the control of any board or commission authorized by this Charter or by law to acquire, hold or control real

property shall not be sold except at the request or with the approval of the board, commission or officer having the management of such department, and the proceeds of such sale shall be paid into the city treasury and placed in the fund of the department having control of such property."

It is to be noted that this section of the Charter does not distinguish between property held or used in the city's governmental capacity and property used in its proprietary capacity. It provides, "Any real property—that is no longer required for the use of the city—may be sold." Provision is made respecting the sale of property "under the control of any board or commission."

No doubt it will be agreed by all the parties that the 185 acres were not subject to the control of any board or commission, and no special or any particular use had been determined for said acreage, although certain public uses had been under consideration.

This would seem to vest in the City Council the right to sell the property if it *properly* determined that the property "it no longer required for the use of the City."

Counsel for petitioner has cited several cases from other jurisdictions which hold that a city may not sell property held for public or governmental use unless authorized by law. There should be no quarrel with this rule.

But it must be remembered that the city is a chartered city; the law that must be considered is the Charter, and that the Charter is supreme in municipal affairs.

The sale of property owned by the city is a municipal affair. (Unless it is in some manner impressed with a statewide interest, or a trust in favor of the state.) (See Wiley v. City of Berkeley, 136 CA 2d 10.)

Regarding petitioners contention which the court has labeled (b):

Assuming that the provision in the Housing Authority deed is a valid restriction on the use of the property "for public purposes only" it would be a conveyance upon a condition subsequent, and a reentry or reversionary clause would be unnecessary. (Taylor v. Continental Southern Corp., 131 CA 2d 267.)

The entire fee is in the grantee subject to the right of the grantor to terminate the estate of the grantee upon condition broken. The grantor "has no actual estate remaining with him." (See Parry v. Berkeley, etc., Foundation, 10 C 2d 422.)

The estate of the grantee does not, however, terminate on the breach of the condition. It is not a defeasible fee. Termination of the grantee's estate requires action on the part of the grantor, and until he acts the grantee's estate is unaffected by the breach. Under Section 1046 of the Civil Code the grantor has such a contingent estate as is transferrable. (See Taylor v. Continental Securities Corp., *Supra*, at page 273.)

As the grantor has such a transferrable contingent estate and the grantor may or may not elect to terminate the grantee's estate upon condition broken, the grantor may release or quitclaim such an estate. (See Werner v. Graham, 181 Cal. 174.)

The court is of the opinion that if the Housing Authority has authority to execute and does execute a release of or a quitclaim deed to its "right of reentry" or "power of termination" there is no reason why the City may not accept it. And there does not seem to be any reason why the City may not request the Housing Authority to do so, if the City Council *properly* has deter-

mined that the property is no longer required for the use of the City.

The court, of course, does not pass on the question of what authority the Housing Authority has or what it may or may not do, as it was dismissed as a party to this action.

II

Petitioner next contends (P & A to Petition points XIV and XVI) (Points VI & VII of Trial Brief) that the finding of the City Council that the lands are no longer required for the use of the City is subject to Judicial Review for abuse of legislative discretion.

Courts of equity have no power to interfere with a municipal body in the exercise of its legislative or discretionary functions, except in cases of fraud, oppression, manifest abuse of discretion or acts that are *ultra vires*.

Petitioner specifically states that there is no claim of fraud or oppression.

The principal complaint of petitioner in this regard is that while the City Council declared that the 185 acres "is no longer required for the use of the City" the ordinance shows on its face that 40 acres of the land proposed to be sold are required for the use of the City and are to be used for recreational purposes.

Counsel for the defendants contend that this involves a municipal affair and that the finding of the City Council cannot be interfered with by the court. They do not go into the question of whether the City, in the face of the finding that the property is no longer required for use by the City, shows on the face of the contract that it needs and requires 40 acres for recreational purposes.

The cases in this state are legion wherein the court has reviewed the facts in order to determine whether, despite the finding, there has been a manifest abuse of discretion.

A false recital is not conclusive on a court. (People v. City of Los Angeles, 62 CA 781 at pages 788-789).

The only facts before the court in this case on this subject are the provisions of the ordinance containing the proposed contract.

The contract recites that the City owns certain property in Chavez Ravine, and "that such property is no longer required for the use of the City."

The eighth recital provides for the construction of recreational facilities on a 40-acre portion of the property to be conveyed by the City—the recreational facilities to be mutually agreed upon by the parties, before the property is conveyed to the Ball Club, and maintained by the Ball Club for 20 years, the City to have control of the facilities —but the City has but a restricted use, and the Ball Club has the right to use the 40 acres for parking. Paragraph 1 (c) provides that the location of the 40 acres is to be designated by the Ball Club, but title thereto shall be retained by the City for 20 years, as a guarantee of the covenant of the Ball Club contained in the eighth recital.

It seems to the court that the provision regarding the use of 40 acres for recreational facilities and the recital:

"Whereas such additional recreational facilities are sorely needed by the City and will fill a definite public need and will be of great value to the City."

indicates that the finding that the land is no longer required for use of the City is not in accordance with the facts recited, and is a manifest abuse of discretion which appears on the face of the contract.

Under such circumstances the court is not bound by the finding of the City Council. (See People v. City of Los Angeles, 62 Cal. App. 781-788.)

In addition to the recital that the City owns certain property in Chavez Ravine, it also is recited that the City "is in the process of acquiring additional property in said area; and—such property is no longer required for the use of the City."

If the land which the City is in the process of acquiring is no longer required for the use of the City, then it is an abuse of discretion and in illegal expenditure of public funds to continue with the process of acquiring lands for which the City, as such, has no public use, solely for the purpose of conveying it to a private corporation for private use, as will hereinafter appear.

Counsel for the defendant City asserts in his brief in the Ruben Case at page 39; (The Brief in the Ruben case is said to be implemented by the brief in this case.) that the ordinance discloses a public purpose in that "the benefits to the public to be derived from bringing major league baseball to the City and tax revenue therefrom, as well as restoring to the tax roll the property and improvements to be built and free recreational facilities to be afforded the public, and the acquisition of Wrigley Field suitable for use by the public—." is a "public purpose." and justifies the use of public funds to consummate the transaction.

Counsel for the City in the Ruben Brief at page 41 also asserts that what is a "public purpose" and the method by which such action is to be performed, or the purpose accomplished; rests in the judgment of the City Council, and cites among other cases City of Roseville v. Tully, 55 CA 2d 601. This case quotes from County of Los

Angeles v. Dodge, 51 C.A. 492, wherein the court said at page 498:

"When the Legislature or a Board of Supervisors or City Council engaged in the exercise of legislative functions, proceeds upon the assumption that a matter concerning which it acts is one affecting the public interest or designed to promote the general welfare, the assumption is conclusive upon the courts *unless it is plainly apparent to them that the view entertained by the legislative body is without just foundation.*" (Emphasis added.)

In the Roseville case it was held that the determination of the City Council that the payment of the expenses of two councilmen, the City Clerk and the City Attorney, as delegates to the Annual Conference of the League of California Cities was in the public interest was binding on the court.

County of Los Angeles v. Dodge involved the lease between the Community Development Association, the City of Los Angeles and the County for the erection by the Association of the Coliseum in Exposition Park. Under the lease the City and the County were each to contribute money toward the construction of the stadium for the right for each to use it during certain parts of the year for public purposes. At the end of 10 years possession of the stadium was to be delivered to the City and the County.

One of the objections made to the lease was that it could "not be authorized by the legislative bodies of the City and County for the reason that the money proposed to be paid by them for the construction of the stadium would not be expended for a public purpose."

The court then stated the rule above quoted; and proceeded to determine whether there was "just foundation"

for the determination of the City and County that the money was to be expended for a public purpose. It is to be noted that no private gain was involved in either of these cases.

These two cases and a host of others show that the finding of the legislative body is not conclusive and that the court may examine the facts to determine whether there has been an abuse of discretion or an illegal expenditure of public funds or that the action is *ultra vires.*,

Counsel for the City also cites Pipes v. Hildebrand, 110 CA 2d 265, and City of Oakland v. Williams, 206 Cal. 315.

Both of these cases involve leasing of city owned property.

In both cases the leasing was held to be a public purpose. But the interesting point in each case is that the court may consider the facts for the purpose of determining whether or not the determination of the legislative body that the project is in furtherance of a "public purpose" is an abuse of discretion. Numerous other cases to the same effect could be cited.

Is it not open to a court to consider whether or not it is a "public purpose" when a City agrees to convey to a ball club, *or its nominee*, 315 acres of land (almost a half-section of land—an area nearly a mile long by a half-mile wide) for use by the ball club "free and clear of any deed restriction on use" and without any agreement that the land shall be used for ball club purposes only?

The court is of the opinion that it is not such a "public purpose" as justifies the use of public funds to acquire property to be transferred to a private corporation for the operation of a private business.

III

The next point raised by petitioner is: "The City of Los Angeles does not have the power to Enter Into an Agreement to Sell to a Private Corporation land that it does not now own." (Point VI P & A to petition and points VIII & IX Trial Brief).

The stipulation of Facts annexed to the Pre-Trial Order states:

"That the approximately 300 acres to be conveyed under the ordinance consists of the following:

(a) Acquired from Housing Authority	169.62	acres
(b) Otherwise owned by the City	15.44	"
	185.06	"
(c) Elysian Park Property	27.67	"
(d) Public and private property to be acquired	59.88	"
(e) School property	2.26	"
(f) Individual small parcels	2.46	"
(g) Streets and Highways	38.43	"
	130.80	"
	315.86	acres

(In the City's Trial Brief in the Ruben case, page 19, paragraph IV, the City states it acquired 15.44 acres by condemnation. This must relate to item (b).).

There now appears to be no doubt that the City may abandon for public use and sell land it has acquired by condemnation. (Arechiga v. Housing Authority, 159 ACA 728, hearing denied by Supreme Court.)

The City also may sell land *owned by the City* that is no longer required for the use of the City under the provisions of Section 393 of the Charter.

Certainly the City cannot *condemn* private property for the purpose of selling it to a private party for private business use. (City and County of San Francisco v. Ross, 44 C 2d 52.)

The public uses for which the power of eminent domain may be exercised in this state are set forth in Sections 1238 to 1238.7 of the Code of Civil Procedure. (Redevelopment Agency v. Hayes, 122 CA 2d 777.)

Where a public and private use are inseparably blended, both must fall as a foundation for the exercise of eminent domain.

(City and County of San Francisco v. Ross, *Supra*.) This case also holds that the right of eminent domain is not a municipal affair, but is a matter of statewide concern. (See also Wilson v. Beville, 47 C 2d 852.)

There is nothing in the City Charter that in any wise indicates that the City has the power to use public funds for the purchase of any property for the purpose of selling it to a private person or private corporation for the operation of a private business for private profit.

The Charter provides that the City has the power, Sec. 2 (11) (1) "to buy, condemn, acquire, or sell anything useful or convenient in connection with the exercise of the City's rights or powers." This must carry the limitation that what is acquired is for a municipal purpose whether governmental or proprietary. (See State v. Town of North Miami, 59 So. 2d 779.)

Conceding that the Charter of Los Angeles is a limitation upon and not a grant of powers, still this provision does not indicate that the City's *rights and powers* include the use of public funds for the benefit of private persons.

Able counsel for both the City and the Ball Club have not cited a California case that holds that a City may purchase property for the purpose of *selling* (not leasing) it to a private person. Their ability and industry would indicate that if there were such a case they would have found it and cited it to the court. In the absence of such a citation the court is inclined to believe that no such case exists. (See Bancroft v. Bancroft, 110 Cal. 374 at page 378.)

If the City can use public funds to acquire property for the purpose of conveying it to a ball club for a ball park, to be operated as a private enterprise, for private profit, then the City may use public funds to acquire property for the purpose of selling it for use for a private bowling alley, a private golf course, a steel mill, an hotel or any other private purpose.

It is stated in 63 Corpus Juris Secundum at page 507, Note 56: "As a rule, a municipal corporation cannot purchase property in aid of any private enterprise, however laudable its purpose or useful its encouragmeer ? And again, Note 59: "On the other hand, money of a municipality may not be used to acquire property ostensibly for a public purpose which is thereafter diverted to the benefit of a private enterprise."

In 35 Cal. Jur. 2nd at page 39 it is said:

"And notwithstanding a Charter provision expressly granting power to the legislatial body of a City to aid in the construction of improvements partaking of a public character, that body may not contract to pay money, or to appropriate the revenue of the City, to aid in the construction of the works of a private corporation."

The case cited in support of this statement is San Diego W. Co. v. City of San Diego, 59 Cal. 517.

In this case it was "urged that the meritorious consideration for the contract between the plaintiff and the City, as stated in the first and third counts of the complaint, is not the water furnished to the City, but the erection of works and machinery, and conducting the water to the place where the City required it.

"If that were the consideration and nature of the resolution adopted by the Board of Trustees, there is nothing in the Charter of the City to sustain it. For the Charter contains no express grant of power to the Board to aid in the construction of improvements partaking of a public character, and in the absence of such authority the action of the Board would be unauthorized. But even if there were in the City Charter a grant of such power, the Board could not, in the exercise of the power, contract to pay money, or to appropriate the revenues of the City to aid in constructing the works of a *private* corporation. Such a contract would be in violation of the Constitution and laws of the State, beyond the scope of the corporate powers of the City and any instruments in writing made, or any resolution adopted, for that purpose would be void."

This case has never been cited on this point but it seems to state the law.

In the case of State v. Town of North Miami, 59 So. 2d 779, the Town of North Miami proposed to issue certificates of indebtedness and with the money received from the sale thereof purchase land and erect an aluminum manufacturing plant. and lease the property to a private corporation for 20 years. The certificates provided they were not a corporate indebtedness of the town and were payable only from the revenues derived from rental of the property. The lease contained an option for renewal for an additional 25 years at a rental equal to the taxes upon

the property if it were privately owned, and the company was given the option to purchase the fee simple title to the property at any time during the life of the agreement, or the extended term for a cash consideration.

The court said the first question that should be decided is whether the transaction served a municipal purpose. The court in this connection quotes from 38 American Jurisprudence, Municipal Corporations, Sec. 484, pages 162 and 163—. "Charter Authority to purchase and hold property of all kinds relates, unless otherwise expressed to such property only as is needed for municipal purposes. As a general rule, a Municipal Corporation has no authority to purchase and hold property for a purpose disconnected with a public use, for that would amount to expending public funds for a purpose which is not public."

At page 784 the court said: "'Every new business, manufacturing plant, or industrial plant which may be established in a municipality will be of some benefit to the municipality. A new super market, a new department store, a new meat market, a steel mill, a crate manufacturing plant, a pulp mill, or other establishments which could be named without end, may be of material benefit to the growth, progress, development and prosperity of a municipality. But these considerations do not make the acquisition of land and the erection of buildings, for such purposes, a municipal purpose . . .

"Our organic law prohibits the expenditure of public money for a private purpose. It does not matter whether the money is derived by *ad valorem* taxes, by gift, or otherwise. It is public money and under our organic law public money cannot be appropriated for a private purpose or used for the purpose of acquiring property for the benefit of a private concern. It does not matter that

(sic) such undertakings may be called or how worthwhile they may appear to be at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional systems. . . .". With respect to the power of the Legislature the court says (p. 785) "It cannot authorize a municipality to spend public money or lend or donate, directly or indirectly, public property for a purpose which is not public."

The court quotes from the case of City of Daytona Beach v. King, 132 Fla. 273, 181 So. 1—at page 787—wherein the court said: "If the taxpayers' money can be diverted and used to finance a private golf course, why not take a further step and finance a private billiard parlor, a private dance hall, *a private baseball team*, a private 'Jook,' or set up a private drug store or private automobile business." (Emphasis added.)

In the opinion of the court that part of the ordinance and agreement wherein it is provided that the City "Will use its best efforts to acquire, . . ., and convey additional land, to make a total of 300 acres more or less—to Ball Club, or Nominee," is void as involving the illegal use of public funds, a manifest abuse of discretion, and *ultra vires*, as beyond the power of the City.

IV

Petitioners point X in his trial brief was withdrawn by him.

V

Petitioners trial brief point XI (Point VII P & A of Petition) that the grantee of lands acquired by condemnation must assume the public use for which the lands were taken is sufficiently answered by the Arechiga case herein-

before cited, and establishes that there is no validity to petitioner's contention.

VI

The court has considered petitioner's trial brief point XII (P & A to Petition Points VIII and IX) but does not believe that the retention of title to the 40 acres for 20 years by the City has the effect claimed by petitioner. No doubt the Assessor would consider whether or not the possessory right of the Ball Club was taxable. But that would be a matter between this Ball Club and the Assessor.

VII

In Petitioner's Brief Point XIII (P & A to Petition Point X) it is contended that the City does not have power to sell land it acquired by condemnation without sealed bidding as required by Section 193, 194 and 195 of the Government Code.

These sections apply only to land acquired under the provisions of Section 14½ of Article 1 of the Constitution and there is no allegation or showing that the lands condemned were acquired for such purposes.

Counsel for petitioner has not called the court's attention to any other statute prescribing the procedure which a Chartered City must follow before selling condemned property owned by it, and the court knows of none. Except for certain properties specified in the Charter, some of which may not be sold, and other properties where special provision is made, there does not seem to be any requirement in the Charter respecting the sale of real property owned by the City, and no longer required for its use, other than is provided in Section 393. This section provides that such property may "be sold . . . . under such terms and conditions, and under such procedure as the Council may by ordinance prescribe, ..."

The court concludes that the City would not be required to call for sealed bids.

VIII

Petitioner has waived Trial Brief Points XIV and XVI. (P & A Points XIII and XII.)

IX

Petitioner asserts in Trial Brief Point XV that if the ordinance or contract is *ultra vires* or void in any one particular then the entire contract and ordinance are void. With this the court agrees, as does counsel for the City.

X

In Trial Brief Point XVII (Point XI P & A to Petition) Petitioner asserts that the City does not have power under its Charter to delegate to a private corporation the manner in which municipal funds shall be spent. This is Paragraph 18 in petitioner's Pre-trial legal contentions.

The attack in this connection is on the provisions of Paragraph 3 of the contract which are: "Prior to passage of title to any of the acreage described in Paragraph 1, City shall spend up to but not to exceed $2,000,000 to place such property in a proper condition to convey to Ball Club or its nominee, the manner in which such money will be spent for such purpose to be designated by Ball Club."

The manner of expenditure of public money is in the nature of a public trust and cannot be delegated to others.

The cases cited by petitioner are of little help from a factual standpoint, but state the general rule.

The provision obligates the City to expend up to $2,000,000 "to place such property in a proper condition to convey to Ball Club, or its nominee."

The question is what is "a proper condition to convey to Ball Club or its nominee"? Who determines what is "proper condition to convey" 315 acres (approximately a half section of land) "to Ball Club, or its nominee"?

The Ball Club. The City has no voice in determining what is "a proper condition" for the contract provides "the manner in which such money will be spent for such purpose to be designated by Ball Club."

It is to be noted that this provision gives the Ball Club the right to determine how *public money* will be spent.

Under this provision the City has no right to disapprove plans decided upon by the Ball Club, nor to object to the "manner in which the money will be spent" for the uncertain purpose of placing the "property in proper condition to convey to the Ball Club or its nominee."

A City Council has no right or power to give a private organization *carte blanche* with respect to the spending of public money. This is an illegal delegation of the duty of the City Council, an abdication of its public trust, and a manifest gross abuse of discretion.

For the foregoing reasons judgment should be and hereby is ordered for Petitioner enjoining and restraining the respondents Walter C. Peterson, in his official capacity as City Clerk of the City of Los Angeles, The City of Los Angeles, a Municipal Corporation, Norris Poulson in his official capacity as Mayor of the City of Los Angeles, and the City Council of the City of Los Angeles, and the members thereof:

1. From executing that certain proposed contract set forth in Los Angeles Ordinance No. 110,204 passed by the City Council of the City of Los Angeles on October 7, 1957, and approved by the Mayor of said City on October

8, 1957, and being identified as a proposed contract between the City of Los Angeles and the Brooklyn National League Baseball Club, Inc., and

2. From conveying to The Brooklyn National League Baseball Club, Inc., or its nominee, the land involved and partially described in and contemplated by said contract and ordinance; and

3. From carrying out the provisions of said Ordinance No. 110,204, or the contract therein set forth, or any part thereof.

Counsel for Petitioner is directed to prepare Findings of Fact and Conclusions of Law in accordance with the foregoing views, and the Judgment.

Dated July 14, 1958.

ARNOLD PRAEGER,

Judge.

APPENDIX C.

Excerpts From Points and Authorities in Support of Plaintiff's Application for a Temporary Restraining Order.

* * * * * * * * *

IV.

ASSUMING THAT A DETERMINATION THAT LAND HELD IN A PROPRIETARY CAPACITY IS NO LONGER REQUIRED FOR THE USE OF THE CITY MAY BE SUBMITTED TO A REFERENDARY VOTE, SUCH A DETERMINATION OF LAND ACQUIRED AND HELD SUBJECT TO A PUBLIC PURPOSE DEED RESTRICTION MAY NOT BE SUBMITTED TO THE VOTERS IN A REFERENDARY ELECTION.

Neither the City of Los Angeles nor the voters thereof could authorize the sale of land held subject to a public purpose deed restriction. Land held subject to a public purpose restriction is inalienable and the voters could not ratify the illegal act of a Council in approving a contract for the sale of such land. The California Courts have uniformly held that such land cannot be sold to private interests. See the following cases set forth in petitioner's Points and Authorities attached to the Petition, pages 18-21:

City of San Francisco v. Itsell, 80 Cal. 57;
Hoadley v. San Francisco, 50 Cal. 265 (affirmed 124 U. S. 646);
Sawyer v. San Francisco, 50 Cal. 375;
California v. San Francisco, 107 Cal. 334;
Hone v. San Francisco, 119 Cal. 534;
La Societa v. San Francisco, 131 Cal. 169;
Ames v. San Diego, 101 Cal. 394;
Futterer v. City of Sacramento, 196 Cal. 248;

Such land being "held as a public trust and for public use are inalienable by the municipal corporation."

Shreveport v. Walpole, 22 La. Ann. 526.

The proposed sale of the land in this case, therefore, to the Brooklyn corporation, would be ultra vires, against public policy and a breach of the trust under which the land was acquired (*Newport v. Ward*, 183 Atl. 571, petitioner's Points and Authorities, p. 26. In that case, the Court, in holding that the attempted sale of municipal owned land held subject to a public use was void, said:

> "It is generally accepted that a municipal corporation which holds property devoted to a public use has no power without legislative authority to sell and convey such property."

The Court in that case then declared:

> "Not only was the attempted conveyance of land Dedicated to the public ultra vires in the strict sense of those words, but it was also clearly against public policy since it was a breach of the trust under which the town held the land for the benefit of the public."

Such a sale would also constitute an impairment of obligation of a contract in violation of Article I, Section 10, of the United States Constitution.

> "It is beyond the power of the State of California or any municipal subdivision thereof by any ordinance or resolution to impair the obligation of such contract."
>
> *Hill v. Oxnard*, 46 Cal. App. 24.

The provisions in the deed that the land is to be used for public purposes only, whether construed as either a restriction, condition or a covenant,

> "Is equivalent to an agreement on the part of the grantee to perform the same."

Such a covenant in a deed creates a trust relationship and imposes upon the grantee an obligation to use the premises for the purposes set forth in the conveyance.

Marshall v. Standard Oil Co., 17 Cal. App. 2d 19.

The provisions in the Charter authorizing the City of Los Angeles to sell its land no longer required for the use of the City, is applicable only to land acquired by the City "unconditionally" and of which it holds the "full title" in a "proprietary capacity." In *State v. City of Manhattan*, 225 Pac. 85, quoted in petitioner's reply to City's reply, Points and Authorities, page 11, the Court there held that it is only such property as is acquired without a deed restriction or acquired by condemnation that a municipality may dispose of. In that case, a suit was brought for a declaratory judgment and a judgment was rendered by the trial Court denying the municipality the authority to sell and convey certain tracts of land which the City had acquired as a public square. The City authorities had submitted this sale to a vote of the voters and the vote had been favorable. Thereupon, the City was proceeding to sell the land when a question arose as to whether the purchaser could get a clear title. The Supreme Court, in upholding the trial Court's injunction against the sale of the land, held that such power provided for by statute permitting the municipality to sell and convey any real or personal estate owned by the City did not include land which had been acquired by the City by dedication.

Similarly, in *Warren v. Bradley*, 284 S. W. 2d 698, the Court said:

> "Ordinarily a municipal corporation may sell or otherwise dispose of the property held for private or proprietary purposes, but may not do so in respect of property held for public or governmental purposes

unless authorized by law. * * * It is true the Charter of the town gives it the right to own property real and personal and may sell, lease or dispose of such property for the benefit of the town; and to do all other acts touching the same as natural persons. However, this right must be held limited to the property it holds in its proprietary not governmental capacity. Nor does the right to contract give it unlimited power."

* * * * * * * * *

Any action taken by a municipality to abandon a public use of property conveyed to a municipality subject to a public use restriction would constitute an impairment of contract in violation of those State and Federal constitutional provisions. (Article I, Section 10 of the United States Constitution, and Article XI, Section 16 of the Constitution of the State of California.) Neither the Council of the City of Los Angeles nor the voters in a referendary election can approve a contract which would violate the foregoing provisions of the United States and State Constitution with respect to impairment of contract obligations.

It is respectfully submitted that neither the Council nor the voters in a referendary election had the lawful power to approve or ratify a contract which as stated hereinabove, is ultra vires and against public policy in numerous particulars. The approval of such a referendary is therefore a complete nullity and its certification should be enjoined by the Court. Particularly is this so when the Court, in another action pending, has heretofore issued a preliminary injunction enjoining the municipality from proceeding under the terms of said ordinance.

PHILL SILVER,

Attorney for Plaintiff.

APPENDIX D.

Portion of Oral Argument on Behalf of Louis Kirshbaum Before California Supreme Court.

Mr. Silver: Mr. Chief Justice and members of the Supreme Court: To bring these proceedings up to date since the petition for prohibition has been filed, there has been an appeal filed by the City and the Dodgers and Judge Praeger's decision in Case No. 699077 direct to the Supreme Court. There has also been a cross-appeal filed by Louis Kirshbaum from that portion of Judge Praeger's decision which was unfavorable. There is an appeal from a decision in favor of the housing authority from a ruling sustaining a demurrer without leave to amend. And then there is a fourth appeal.

The Clerk's transcripts have been completed, and I have no official information as to the Reporter's transcript. But I am advised that it was ordered by the Defendant.

Now, I ask permission to file with the Court by reference in this proceeding the following: 1, the Clerk's transcript prepared by the County Clerk in Los Angeles Superior Court Case No. 699077, both on the appeal taken by the Dodgers and the City and the cross-appeal filed by Kirshbaum.

Second, the reporter's transcript when it will completed.

Third, all exhibits offered into evidence, including those that have been offered and refused.

Four, the points and authorities filed by Kirshbaum, which is attached to the petition, and which was not included by the petition in this case.

Five, the trial brief of Kirshbaum filed with Judge Praeger in Case No. 699077.

In the alternative, I move the Court to consolidate the various appeals now pending in this proceeding and hold in abeyance any further action on this proceeding until this Court has rendered its decision on the validity of the contract in the appeal involving Case No. 699077. I also ask for permission to file a reply brief to the answering brief of the Dodgers which was served upon me by mail on Monday of this week.

My contentions in this proceeding are as follows:

First, that the Superior Courts of California have jurisdiction to enjoin certification of the results of a referendum election involving an ordinance approving an illegal contract;

Second, that prohibition directed against an injunction granted by the Superior Court would lie only if the contract, as a matter of law, is a valid contract;

Third, if, in the determination as to whether the contract is a valid one, evidence would be required on any question of fact, prohibition by the Supreme Court would constitute a denial of due process of law.

* * * * * * * * * *

ORDINANCE NO. 110,204

An Ordinance authorizing and approving contract between The City of Los Angeles, a municipal corporation, and the Brooklyn National League Baseball Club, Inc., a New York corporation, and authorizing the execution thereof.

WHEREAS, the contract authorized and approved by this ordinance would be highly beneficial to the City of Los Angeles and the inhabitants and taxpayers thereof and to the public and is useful and convenient in connection with the exercise of the City's rights and powers, all as more particularly set forth in said contract,

NOW, THEREFORE,

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. That The City of Los Angeles enter into a contract between The City of Los Angeles, a municipal corporation, and the Brooklyn National League Baseball Club, Inc., a New York corporation, in words and figures substantially as follows:

AGREEMENT

THIS AGREEMENT, made and entered into this——day of————————, 1957, by and between THE CITY OF LOS ANGELES, a municipal corporation (hereinafter called City), and the BROOKLYN NATIONAL LEAGUE BASEBALL CLUB, INC., a New York corporation (hereinafter called the Ball Club), WITNESSETH:

WHEREAS, City is the owner of certain property in an area generally known as Chavez Ravine, and is in the process of acquiring additional property in said area; and

WHEREAS, such property is no longer required for the use of the City; and

WHEREAS, the bringing of major league baseball to Los Angeles would result in direct and indirect benefits to the City, and would be highly beneficial to the City, to the public, and to its inhabitants to have such property the site of a major league baseball stadium; and

WHEREAS, the placing of such property on the tax rolls would produce substantial additional property tax revenues to the City; and

WHEREAS, the City would receive substantial tax revenues from sources, other than the Ball Club, incident to major league baseball in Los Angeles; and

WHEREAS, the Ball Club is willing to acquire such property, and would, at its cost and expense, ball stadium and grounds known as Wrigley Field conveyed to City; and

WHEREAS, said Wrigley Field would be suitable for such purposes and would be of great value to the City and its inhabitants; and

WHEREAS, Ball Club is willing to cause Wrigley Field to be conveyed to the City for said property now owned and to be acquired as aforesaid by the City in Chavez Ravine; and

WHEREAS, the bringing of said Major League Baseball Club to Los Angeles would result in a large additional payroll in this area; and

WHEREAS, all of the foregoing is useful and convenient in connection with the exercise of the City's rights and powers and is in the public interest,

NOW, THEREFORE, IT IS UNDERSTOOD AND AGREED AS FOLLOWS, TO WIT:

1, City will convey the property presently owned by it in Chavez Ravine consisting of 185 acres, more or less, and will use its best efforts to acquire, at a reasonable cost, and convey additional land, to make a total of 300 acres, more or less, all as shown in Exhibit A, to Ball Club, or nominee; provided, however:

(a) City shall reserve all mineral rights which it now owns or may hereafter acquire, and a suitable drill site for the production of oil from said property, the location of such site to be mutually agreed upon by the parties hereto, which location shall not interfere with Ball Club's operations, and not exceed 5 acres in size.

(b) One-half of all monies, payments, royalties, or other consideration received by City from said mineral rights, or any of them, in whole or in part, shall be placed in a special trust fund by City, and such funds shall be expended solely for the purpose of providing and maintaining recreational facilities to promote the youth program of Ball Club, the location and type of such recreational facilities to be mutually agreed upon by the parties hereto, with approval by the City Council by ordinance.

(c) That title to said 40 acres thereof, the location of such 40 acres to be designated by Ball Club, shall be retained by the City for a period of 20 years to assure performance by Ball Club of its policy of providing and maintaining recreational facilities. In the event such policy, and all of the terms of this agreement pertaining to the recreational facilities on said 40 acres, shall have been fully and faithfully performed for a period of 20 years, title of such 40 acres shall be conveyed to the Ball Club, or nominee, forthwith, without further consideration.

the land and improvements now known as Wrigley Field, including all mineral rights; provided, however, that one-half of all monies, payments, royalties, or other consideration received by City from said mineral rights, or any of them in whole or in part, shall be placed in a special trust fund by City and such funds shall be expended solely for the purpose of providing and maintaining recreational facilities to promote the youth program of Ball Club, the location and type of such recreational facilities to be mutually agreed upon by the parties hereto, with approval by the City Council by ordinance; further provided, that Ball Club reserves the right to the use of said Wrigley Field until the stadium referred to in paragraph 6 shall be completed and ready for use, conditioned upon payment to City of a rental to be mutually agreed upon.

6. Ball Club shall cause to be constructed on property conveyed by City, at Ball Club's cost and expense, a modern baseball stadium, seating not less than 50,000 people.

7. Ball Club will cause to be moved to the City of Los Angeles the present Brooklyn National League Baseball franchise and ball team known as the "DODGERS".

The City of Los Angeles agrees that it will intiate proceedings for the purpose of rezoning said property to "C-3" and for the granting of a conditional use permitting its use for a baseball stadium as herein provided.

It is recognized that the method or means of carrying out the terms and conditions of this contract in detail have not been provided herein in every instance but that the parties hereto will use their best efforts in arriving at mutually acceptable methods of procedure and modes of operation as to such details. Any such action on the part of the City shall be submitted to the City Council for approval.

IT IS EXPRESSLY UNDERSTOOD AND AGREED that this agreement is made in reliance upon the action taken by the Board of Supervisors of the County of Los Angeles in Resolution of said Board of Supervisors adopted and entered in the minutes of said Board on Tuesday, September 17, 1957, a copy of which said resolution is attached hereto, marked Exhibit "B", and made a part hereof, providing for the furnishing of funds to construct necessary access roads, including cost of acquiring any required rights of way, and the City agrees that upon the County's making such funds available to City it will diligently proceed with the construction of such access roads. City agrees that it will make demand as required upon the County of Los Angeles to furnish the funds heretofore or hereafter voted

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OF LOS ANGELES FOR PUBLIC APPROACH ROAD IMPROVEMENTS TO THE CHAVEZ RAVINE AREA AND INSTRUCTING CHIEF ADMINISTRATIVE OFFICER AND ROAD COMMISSIONER RELATING TO FUNDS REQUIRED.

On motion of Supervisor Hahn, duly carried by the following vote, to wit: Ayes; Supervisors Legg, Hahn, Chace, Dorn and Ford; Noes, none, it is ordered that the following resolution be and the same is hereby adopted:

WHEREAS, the Board of Supervisors of the County of Los Angeles believes that Major League Baseball would be a recreational and economic asset to this community; and

WHEREAS, both the City and the County have entered into negotiations with the Brooklyn Dodgers, looking toward the transfer of that Club's franchise from New York to Los Angeles; and

WHEREAS, these negotiations contemplate that a site in the Chavez Ravine area will be made available for the construction by the Brooklyn Ball Club of a modern baseball stadium — with parking facilities for 25,000 cars; and

WHEREAS, the Brooklyn Ball Club is also proposing to develop on the site a regional sports center covering approximately 40 acres, these recreational facilities to be available for free public use; and

WHEREAS, if this total development is accomplished, there will be a major increase in vehicular traffic in the Chavez Ravine area because of the public use of the proposed facilities; and

WHEREAS, traffic engineering studies show that present access streets to the Chavez Ravine site are entirely inadequate to accommodate the public use thereof, as contemplated:

NOW, THEREFORE, BE IT RESOLVED that the County of Los Angeles determines that if the proposed improvements are located in the Chavez Ravine area as contemplated the public necessity and convenience will require approach road improvements to the area, and that such improvements will be of general county interest; and

BE IT FURTHER RESOLVED that if a site in the Chavez Ravine area is made available by the City of Los Angeles for these purposes—and concrete evidence of its contemplated or actual improvement in the manner and for the purposes referred to herein is presented to the County, the County of Los Angeles will make available in the manner provided by law a sum of money not to exceed $2,740,000.00 or as much thereof as is needed, to the City of Los Angeles payable on demand by the City, for public approach road improvements to

tax revenues from sources, other than the Ball Club, incident to major league baseball in Los Angeles; and

WHEREAS, the Ball Club is willing to acquire such property, and would, at its cost and expense, construct a major league baseball stadium for the purpose of providing facilities for the major league baseball club known as the BROOKLYN DODGERS; and

WHEREAS, such Club has a long-standing policy of admitting juveniles to various games free of charge as a method of combating juvenile delinquency and stimulating interest in healthful recreational activities; and

WHEREAS, as part of this policy said Ball Club will construct recreational facilities costing not to exceed a half million dollars on a 40-acre portion of the property to be conveyed by the City, as herein provided, in Chavez Ravine, such recreational facilities to be mutually agreed upon by the parties hereto before such property is conveyed to said Ball Club, such recreational facilities to be constructed simultaneously with the construction of said stadium; and as a further part of said policy Ball Club will maintain such recreational facilities for a period of 20 years, at an annual cost of $60,000, but shall be under no obligation to furnish personnel for the operation thereof; provided, that in the event such maintenance cost in any one year does not amount to $60,000, then as a further part of said Ball Club policy the difference between such maintenance cost and $60,000 shall be paid to City so that it may be used by City for the providing of or maintaining recreational facilities elsewhere in said city.

In this connection, it is understood that such recreational facilities shall be under the control of City, but City shall not permit the scheduling of any event at any of the recreational facilities on said 40 acres which would involve the concentration of a large number of participants or spectators during any time when Ball Club has scheduled an event at said baseball stadium, and that during any event at said baseball stadium Ball Club shall have the right to use any facilities suitable for parking as may be provided within said 40 acres; and

WHEREAS, such additional recreational facilities are sorely needed by the City and will fill a definite public need and will be of great value to the City; and

WHEREAS, the City is also in need of a suitable place for the holding of various events, including but not limited to amateur baseball games and similar activities; and

WHEREAS, Ball Club is able to have the base-

ties on said 40 acres, shall have been fully and faithfully performed for a period of 20 years, title of such 40 acres shall be conveyed to the Ball Club, or nominee, forthwith, without further consideration.

It is understood and agreed that any violation of the terms of the agreement with reference to the recreational facilities shall not invalidate or affect any transfers of land which may theretofore have been made pursuant to this agreement.

(d) All property herein agreed to be conveyed by City, including said 40 acres, will be conveyed free and clear of any deed restriction on use, and title policy shall be furnished to Ball Club. In this connection, it is expressly understood and agreed that the portion of property described in paragraph 1 now owned by the City and which was acquired by City from the Los Angeles Housing Authority has a deed restriction reading, in part, as follows:

"To be used for public purpose only; and not to be used directly or indirectly by the City of Los Angeles, or its grantees, successors in interest, assigns, or any other person or persons whatsoever claiming by, through or under the City of Los Angeles, for a period of 20 years from and after the date hereof, for residential development or residential subdivision."

City agrees to use its best efforts to have such deed restrictions eliminated or modified so as to permit the use contemplated by Ball Club; provided that in the event City is unable to have such restriction so eliminated or modified, this contract shall be of no further force or effect.

2. Upon conveyance of such property to Ball Club, the existing public streets therein which would no longer be needed for present or future street purposes will be vacated and the City shall, upon demand of Ball Club, commence proceedings to vacate said streets and deliver any title which may remain in the City without further consideration.

3. Prior to passage of title to any of the acreage described in paragraph 1, City shall spend up to but not to exceed $2,000,000 to place such property in a proper condition to convey to Ball Club or its nominee, the manner in which such money will be spent for such purpose to be designated by Ball Club.

4. City agrees to provide such public streets as may be needed within the periphery of the area to be acquired by Ball Club; provided, however, that the cost thereof, other than the cost of acquiring necessary land, shall be considered a part of the $2,000,000 which the City is to spend to prepare the site for sale.

5. Ball Club shall cause to be conveyed to City upon the County's making such funds available to City it will diligently proceed with the construction of such access roads. City agrees that it will make demand as required upon the County of Los Angeles to furnish the funds heretofore or hereafter voted and/or appropriated for said access roads.

IN WITNESS WHEREOF, The City of Los Angeles has caused this instrument to be executed in its behalf by its duly authorized officers, and the Ball Club has executed the same by its duly authorized officers and has caused its corporate seal to be hereunto affixed, all on the day and year first hereinabove written.

THE CITY OF LOS ANGELES,
By .....

(SEAL)
ATTEST:

.....
City Clerk

BROOKLYN NATIONAL LEAGUE BASEBALL CLUB, INC.
By .....
President
By .....
Secretary

(SEAL)

EXHIBIT "B"

Gordon T. Nesvig, Chief Clerk of the Board.

COUNTY OF LOS ANGELES BOARD OF SUPERVISORS, 501 HALL OF RECORDS, LOS ANGELES 12.

Members of the Board: John Anson Ford, Chairman; Herbert C. Legg, Kenneth Hahn, Burton W. Chace and Warren M. Dorn.

RESOLUTION

Introduced by Supervisor

Tuesday, September 17, 1957

The Board met in regular session. Present: Supervisors John Anson Ford, Chairman presiding, Herbert C. Legg, Kenneth Hahn, Burton W. Chace and Warren M. Dorn; and Harold J. Ostly, Clerk, by Gordon T. Nesvig, Deputy Clerk.

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IN RE MAJOR LEAGUE BASEBALL IN COUNTY OF LOS ANGELES: RESOLUTION DETERMINING THAT COUNTY OF LOS ANGELES WILL MAKE AVAILABLE $2,740,000.00 TO CITY

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"To be used for public purpose only; and not to be used directly or indirectly by the City of Los Angeles, or its grantees, successors in interest, assigns, or any other person or persons whatsoever claiming by, through or under the City of Los Angeles, for a period of 20 years from and after the date hereof, for residential development or residential subdivision."

City agrees to use its best efforts to have such deed restrictions eliminated or modified so as to permit the use contemplated by Ball Club; provided that in the event City is unable to have such restriction so eliminated or modified, this contract shall be of no further force or effect.

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3. Prior to passage of title to any of the acreage described in paragraph 1, City shall spend up to but not to exceed $2,000,000 to place such property in a proper condition to convey to Ball Club or its nominee, the manner in which such money will be spent for such purpose to be designated by Ball Club.

4. City agrees to provide such public streets as may be needed within the periphery of the area to be acquired by Ball Club; provided, however, that the cost thereof, other than the cost of acquiring necessary land, shall be considered a part of the $2,000,000 which the City is to spend to prepare the site for sale.

5. Ball Club shall cause to be conveyed to City upon the County's making such funds available to City it will diligently proceed with the construction of such access roads. City agrees that it will make demand as required upon the County of Los Angeles to furnish the funds heretofore or hereafter voted and/or appropriated for said access roads.

IN WITNESS WHEREOF, The City of Los Angeles has caused this instrument to be executed in its behalf by its duly authorized officers, and the Ball Club has executed the same by its duly authorized officers and has caused its corporate seal to be hereunto affixed, all on the day and year first hereinabove written.

THE CITY OF LOS ANGELES,
By .....

(SEAL)
ATTEST:

.....
City Clerk

BROOKLYN NATIONAL LEAGUE
BASEBALL CLUB, INC.
By .....
President
By .....
Secretary

(SEAL)

EXHIBIT "B"

Gordon T. Nesvig, Chief Clerk of the Board.

COUNTY OF LOS ANGELES BOARD OF SUPERVISORS, 501 HALL OF RECORDS, LOS ANGELES 12.

Members of the Board: John Anson Ford, Chairman; Herbert C. Legg, Kenneth Hahn, Burton W. Chace and Warren M. Dorn.

RESOLUTION

Introduced by Supervisor

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IN RE MAJOR LEAGUE BASEBALL IN COUNTY OF LOS ANGELES: RESOLUTION DETERMINING THAT COUNTY OF LOS ANGELES WILL MAKE AVAILABLE $2,740,000.00 TO CITY

County of Los Angeles will make available in the manner provided by law a sum of money not to exceed $2,740,000.00 or as much thereof as is needed, to the City of Los Angeles payable on demand by the City, for public approach road improvements to the Chavez Ravine area; and

BE IT FURTHER RESOLVED that the Board of Supervisors hereby instruct the Chief Administrative Officer and the Road Commissioner to include within the Road Department 1958-59 budget (Motor Vehicle Fund) for the purposes recited herein an appropriation in an amount estimated to be required for expenditure in 1958-59, and in subsequent years as required, appropriations representing the balance required out of the total commitment of $2,740,000.00, provided that such balance be further reduced by any funds which may be advanced during the current fiscal year by action of the Board of Supervisors.

I hereby certify that the foregoing is a full, true and correct copy of a resolution which was adopted by the Board of Supervisors of the County of Los Angeles, State of California, on September 17, 1957, and entered in the minutes of said Board.

HAROLD J. OSTLY, County Clerk of the County of Los Angeles, State of California, and ex officio Clerk of the Board of Supervisors of said County.

By /s/ VIRGINIA MULLENDORE
Deputy Clerk

(SEAL)

Sec. 2. That the Mayor of The City of Los Angeles and the City Clerk be, and they are hereby, authorized and directed to, respectively, execute and attest said contract substantially as set forth in Section 1 hereof for and on behalf of The City of Los Angeles.

Sec. 3. The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was introduced at the meeting of the Council of the City of Los Angeles of September 30, 1957, and was passed at its meeting of October 7, 1957.

WALTER C. PETERSON,
City Clerk,
By A. M. Morris, Deputy.

Approved October 8, 1957.
NORRIS POULSON,
Mayor.

File No. 78067

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 155.

LOUIS KIRSHBAUM,

Appellant,

vs.

THE CITY OF LOS ANGELES, a municipal corporation, THE CITY COUNCIL OF THE CITY OF LOS ANGELES, LOS ANGELES DODGERS, INC., and THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES,

Appellees.

On Appeal From the Supreme Court of the State of California.

MOTION OF LOS ANGELES DODGERS, INC. TO DISMISS.

Appellee Los Angeles Dodgers, Inc., respectfully moves that the above-entitled appeal be dismissed on the grounds that (1) the appeal presents no substantial federal question, and (2) the federal questions sought to be reviewed were not timely or properly raised, or expressly passed upon below.

Opinions Below.

The opinion in the Supreme Court of California in this case (J.S. App. 1)* is reported in 51 Adv. Cal. 425. The opinion in the Supreme Court of California in the related cases of *Ruben v. City of Los Angeles* and *Kirshbaum v. City of Los Angeles* is reported in 51 Adv. Cal. 861 and a copy thereof is attached hereto as an appendix (hereinafter referred to as "App."). The opinion of the Los Angeles Superior Court in the related case of *Kirshbaum v. Housing Authority* (J.S. App. 17) is not reported.

Jurisdiction.

The judgment of the Supreme Court of California was filed on January 13, 1959, and appellant's petition for rehearing was denied without opinion on February 11, 1959 (Clk. Tr. v. 1).** Notice of appeal to this Court was filed on April 30, 1959 (Clk. Tr. v. 1). The jurisdiction of this Court is sought to be invoked under Section 1257(2) of the Judicial Code (28 U.S.C. §1257(2)).

Questions Presented.

The City of Los Angeles and Los Angeles Dodgers, Inc., negotiated a contract under which the City is to convey to the Dodgers certain property for use as a baseball stadium site, and the Dodgers are to convey to the City certain other real property and to construct and maintain certain public recreational facilities. As required by the City Charter, the contract was embodied in a municipal ordinance which the City Council and Mayor approved.

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*Throughout this Motion, references to pages of the Jurisdictional Statement are made as follows: "J.S. ...." and to pages of the appendix thereof as follows: "J.S. App. ....."

**Throughout this Motion, references to the volumes of the transcript of the record, as prepared by the Clerk of the court below, are made as follows: "Clk. Tr. v. ....."

Subsequently, the ordinance was approved by a majority of the voters at a referendary election.

Appellant thereupon brought a taxpayer's suit in the Superior Court of Los Angeles County seeking to enjoin the certification of the referendary election upon the ground that the ordinance (and contract) would be invalid. The Superior Court granted a preliminary injunction. The City then commenced the instant case as an original action in the Supreme Court of California seeking a writ of prohibition to restrain the Superior Court from enforcing its preliminary injunction or from taking any further steps in the injunction suit. The Supreme Court of California ordered the issuance of a peremptory writ of prohibition as prayed for, holding, *inter alia*, that there were no unresolved issues of fact; that, therefore, prohibition would lie under state law to test the validity of the contract; and that the contract as a whole was for a public purpose and was in all respects valid.

In these circumstances, the principal question presented is whether the Supreme Court of California deprived appellant of due process of law by ruling upon the validity of the contract in the prohibition proceeding and granting a writ to prevent the Superior Court from proceeding with the injunction action.

The only other question argued by appellant is whether he, as a City taxpayer, had rights in the property to be conveyed to the Dodgers which were impaired by the contract to convey.*

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*This statement of Questions Presented embraces appellant's Questions 1, 2, 4 and 6—the only questions as to which any argument is made in the Jurisdictional Statement. Appellant has left unargued his Questions 3, 5 and 7. As will also appear in the argument to follow, none of appellant's questions—with the possible exception of Question 6—was timely raised.

Statement.

In October, 1957, the City Council of the City of Los Angeles adopted and the Mayor of the City approved Ordinance No. 110,204. The ordinance provided that the City "enter" into a certain contract with the Brooklyn National League Baseball Club (now known as Los Angeles Dodgers, Inc.) in form substantially as set forth in the ordinance. Within the time prescribed by the Charter of the City of Los Angeles, referendary proceedings with reference to the ordinance were instituted.

The referendary election was held on June 3, 1958, and resulted in a majority vote in favor of the adoption of the ordinance. Under the City Charter (§§ 284 and 305, 1925 Cal. Stat. 1116 and 1951 Cal. Stat. 4392, respectively), it then became the duty of the City Council to declare the result of the election, thus rendering the ordinance effective as having been duly adopted by the voters.

Before this declaration was made by the Council, appellant Kirshbaum commenced a taxpayer's injunction suit.* In that action Kirshbaum secured first a temporary restraining order and then, on hearing, a preliminary (*pendente lite*) injunction restraining the Council from declaring the result of the election in question.

Following the granting of the preliminary injunction, the City of Los Angeles filed an original proceeding in the Supreme Court of California seeking a writ of prohibition to restrain the Superior Court of Los Angeles County from enforcing the preliminary injunction or from taking any further proceedings in the injunction suit. It is this

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*Kirshbaum v. City of Los Angeles, et al., Los Angeles County Superior Court No. 703,023. This is the action referred to by appellant (J.S. 12) and herein as the "referendum case."

prohibition proceeding which is the subject of the instant appeal in this Court.

The prohibition case was argued before the Supreme Court of California on November 6, 1958. At the argument, it was stipulated that the records in two earlier filed and tried companion cases, *Ruben v. City of Los Angeles, et al.*, Los Angeles Superior Court No. 687,210, and *Kirshbaum v. Housing Authority, et al.*, Los Angeles Superior Court No. 699,077,* might be deemed to be before the court in the prohibition proceeding. Like the injunction suit first mentioned above (viz., the referendum case), these latter actions were also taxpayer's actions seeking to enjoin the execution or performance of the proposed contract between the City and Los Angeles Dodgers, Inc., on various grounds. As indicated above, these latter actions had been tried and decided by the Superior Court** prior to the argument in the California Supreme Court in the instant case.

Following supplemental briefing, the Supreme Court of California, on January 13, 1959, rendered its opinion and judgment in the prohibition proceeding upholding the validity of the proposed contract and ordered that a peremptory writ issue as prayed. Appellant's petition for rehearing was denied on February 11, 1959. Notice of appeal to this Court was filed on April 30, 1959.

On May 27, 1959, the Supreme Court of California issued its peremptory writ of prohibition commanding the

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*Referred to by Appellant at J.S. 7 and 10 and sometimes referred to herein as the "first *Kirshbaum* case" or "first *Kirshbaum*."

**The decision of the Superior Court in those cases (J.S. App. 17) against the validity of the proposed contract was later reversed, with directions, by the California Supreme Court. *Ruben v. City of Los Angeles, Kirshbaum v. Housing Authority.* (App. 1.)

Superior Court to refrain from any further proceedings in the referendum case, *Kirshbaum v. City of Los Angeles*, and such writ was served on the respondent Superior Court and duly filed. On May 28, 1959, the City Council, being freed by the issuance of the writ from the restraint theretofore imposed by the preliminary injunction in the referendum case, duly declared the result of the referendary election above mentioned, thereby rendering Ordinance No. 110,204 effective and operative. See Los Angeles City Charter §284, 1925 Cal. Stat. 1116. On June 3, 1959, the proposed contract, in precise form as set forth in Ordinance No. 110,204 (J.S. App. opposite p. 44), was duly executed by both parties thereto and is now operative as Contract No. 27562 of the City of Los Angeles.

As is apparent both from the record and from the jurisdictional statement herein, all claims of appellant stem from various provisions of the contract under attack. The salient portions of the contract were epitomized in the opinion of the California Supreme Court, as follows:

> "The contract, as set forth in Ordinance No. 110,204, provides that the City will convey to the ball club 185 acres, more or less, of land presently owned by it in Chavez Ravine and will use its best efforts to acquire at a reasonable cost and convey additional land to make a total of about 300 acres, reserving, among other things, an oil drilling site not to exceed five acres, the location of the site to be mutually agreed upon by the parties. Title to 40 acres of the 300, to be designated by the ball club, is to be retained by the city for 20 years to assure performance by the ball club of its obligations to provide and maintain certain recreational facilities during that period, after which title is to be conveyed to the club.

"The city is to employ its best efforts to have eliminated or modified a deed provision restricting the use of certain property acquired by the city from the Los Angeles Housing Authority, provided that if the city is unable to have the restriction altered to permit the use contemplated by the ball club, the contract shall be of no further effect. Upon conveyance of the property to the club, existing public streets therein no longer needed for street purposes will be vacated, and the city, upon demand of the ball club, is to commence proceedings to vacate such streets and deliver title to the club. Prior to passage of title to any of the 300 acres, the city is to spend up to but not to exceed $2,000,000, in the manner to be designated by the ball club, to place such property in a proper condition to convey to the ball club. The city also is to perform certain acts with respect to construction of additional streets, rezoning the property, and obtaining funds from the county for access roads.

"The ball club agrees to construct on the Chavez Ravine property, at its expense, a modern baseball stadium seating at least 50,000 people. It will move to Los Angeles the present Brooklyn National League franchise and ball team known as the "Dodgers." Further, the club will convey to the city the land and improvements known as Wrigley Field, reserving the right to use of the field until the stadium is completed, conditioned upon payment of a rental to be mutually agreed upon.

"Recreational facilities costing not over $500,000 are to be constructed by the ball club on the 40-acre portion of the Chavez Ravine property referred to above, such facilities to be mutually agreed upon prior

to conveyance of the property. The club is to maintain the recreational facilities on the 40-acre parcel at an annual cost of $60,000, and in the event the maintenance does not amount to that much in any year, the club is to pay the city the difference between $60,000 and the actual cost. The ball club is under no obligation to furnish personnel for the operation of the recreational facilities, and, with certain exceptions, the city is to have control of them.

"In addition, the agreement contains a number of recitals of fact and declarations of policy to the general effect that the contract will be beneficial to the city and that the property which the city now owns and is to convey to the ball club is no longer required for the use of the city.

"The city reserves all mineral rights in the Chavez Ravine property, and it is to acquire all mineral rights in Wrigley Field. The agreement directs that one-half of the receipts from the mineral rights is to be placed by the city in a special trust fund and expended solely for the purpose of providing and maintaining recreational facilities to promote the youth program of the ball club, the location and type of facilities to be mutually agreed upon by the parties. The ball club has given formal notice to the city that the club has waived and relinquished all rights conferred upon it under these provisions and has assigned to the city all such rights. The provisions being solely for the benefit of the club, it could properly waive them, and there is no longer any reason to treat them as parts of the contract." (J.S. App. 4-6.)

ARGUMENT.

The Statement as to Jurisdiction asks this Court to review a decision of the California Supreme Court upholding the validity of a contract between the City of Los Angeles and the Los Angeles Dodgers, Inc.* In its main aspect, this contract is nothing more than an agreement for the exchange of real property. The only real question involved below was the validity of the contract *under state law,* and on this point the Supreme Court of California approved the contract emphatically, unanimously, and not once but twice.** Thus, although the baseball stadium referred to in the contract is naturally a matter of interest to the sports world, the local controversy over the validity of the contract does not present any important or recurrent question of federal law.

The attempt of appellant to inject federal questions into this case constitutes, in the main, a mere afterthought. Neither of the two opinions of the Supreme Court of California discusses any of the so-called federal questions which appellant now belatedly seeks to urge upon this Court. With but one possible exception, the questions were not timely raised, and, in any event, they all were and are devoid of substance.

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*Only because the contract required authorization by an ordinance passed by the City Council is there any possible basis for an appeal under Section 1257(2) of the Judicial Code. See Los Angeles City Charter §390, 1935 Cal. Stat. 2360; and see Los Angeles City Charter §§281 and 385, 1931 Cal. Stat. 2626 and 1949 Cal. Stat. 3124, respectively.

**See, in addition to the opinion below, the opinion in *Ruben v. City of Los Angeles,* and *Kirshbaum v. Housing Authority.* (App. 1.)

I.

The Federal Questions Sought to Be Raised by Appellant Are Unsubstantial.

Appellant seeks to raise seven separately-stated but overlapping questions. For convenience, the argument in support of this Motion to Dismiss will be organized in terms of appellant's seven "Questions Presented."

A. Questions 1 and 2 Concerning the Asserted Usurpation by the California Supreme Court of the Jurisdiction of the Los Angeles County Superior Court.

Appellant's principal contention in this Court is that the California Supreme Court denied him due process of law in that it "unconstitutionally" interfered with or divested the Superior Court of Los Angeles County of the latter's jurisdiction. (J.S. 4, 19-28.) In substance, this is a claim that the California Supreme Court misinterpreted its power under the state Constitution "to issue writs of . . . prohibition, . . . and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." California Constitution, Article VI, Section 4.

"But it is . . . well settled that it is for the Supreme Court of a State finally to determine its own jurisdiction and that of other local tribunals, since the decision involves a construction of the laws of the State by which the court was organized." *Standard Oil v. Missouri*, 224 U.S. 270, 281. "And . . . there is nothing in the clauses of the Fourteenth Amendment guaranteeing due process and equal protection which converts an issue respecting the jurisdiction of a state court under the constitution and statutes of the State into anything other than a question of state law, the decision of which by the state court of last resort is binding upon this court." *Gasquet v. Lapeyre*, 242 U. S. 367, 369.

It follows that appellant's Questions 1 and 2 are unsubstantial. "The due process clause does not take up the laws of the several States and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law." *Enterprise Irrig. Dist. v. Canal Co.*, 243 U. S. 157, 166; and see *Neblett v. Carpenter*, 305 U. S. 297, 302.

In any event, there is no merit to appellant's contention that prohibition was improper under state law. That contention is bottomed on a claim that several specific "questions of fact" which bore on the issue of the validity of the contract had not yet been tried in the Superior Court.* But that claim is unavailable for the simple reason that *all* issues of fact relating to the validity of the Ordinance which were tendered by appellant in his complaint in the referendum case were actually tried by the Superior Court in the first *Kirshbaum* case, and the record in first *Kirshbaum* was by stipulation before the Supreme Court of California in the prohibition proceeding.** Moreover, as was pointed out to the court below, there was no conflict in the evidence in either *Ruben* or first *Kirshbaum*—cases which had actually been tried.*** In such circumstances the Supreme Court of California

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*See J.S. 14-15.

**Clk. Tr. v. I (Brief of Kirshbaum in opposition to writ, filed Dec. 11, 1958, pp. 3-6a); Clk. Tr. v. I (Transcript of oral argument before Supreme Court on Nov. 6, 1958, pp. 39-41).

***Clk. Tr. v. I (Supplemental Brief of RPI (Real Party in Interest) Dodgers, filed December 3, 1958, pp. 3-6). At J.S. 10 appellant refers to certain "findings" which were assertedly made by the Superior Court in the first *Kirshbaum* case. These were not findings; they were conclusions of law held to be erroneous by the state Supreme Court on the first *Kirshbaum* case appeal, *Kirshbaum v. Housing Authority*. (App. 1.) The findings actually made by the Superior Court in that case were innocuous and are found in Clk. Tr. v. II (Kirshbaum clerk's transcript pp. 28-29).

was fully empowered to determine the meaning and validity of the contract as a matter of law. *E.g., Estate of Platt*, 21 Cal. 2d 343, 352.

Accordingly, the state Supreme Court was amply justified in its holding below that "none of the persons attacking the contract has pointed to any evidence which would present a substantial question of fact upon a material issue." (J.S. App. 4.) This is a complete answer to appellant's contention. Certainly a disagreement with the state Supreme Court's appraisal of the record before it (including, by stipulation, the record in both the *Ruben* and first *Kirshbaum* cases), does not present a federal question of substance.

Furthermore, and wholly apart from their lack of substance, Questions 1 and 2 were not timely or properly raised below. In response to the Petition for Writ of Prohibition, appellant initially filed a paper entitled "Points and Authorities by Louis Kirshbaum in Opposition to Petition for Prohibition." (Filed August 25, 1958, Clk. Tr. v. I.) In that document appellant made no claim at all based upon the Constitution or laws of the United States.

Thereafter, following the oral argument in this prohibition proceeding, appellant filed a second document with the court below entitled "Brief of Respondent Louis Kirshbaum in Opposition to Application for Prohibition." (Filed December 11, 1958, Clk. Tr. v. I.) In that brief appellant contended: "If in the determination as to whether the proposed contract is valid, evidence was required on any question of fact, prohibition by the Supreme Court [of California] would constitute a denial of due process of law." (p. 54.) And he made the same contention, in the same form, at the oral argument. (J.S. App. 44.) "But it is settled that such an averment making no reference to the Constitution of the United States and asserting no

express rights hereunder is solely referable to the state Constitution, which in this instance has a due process clause,* and affords no basis whatever for invoking the jurisdiction of this court." *Bowe v. Scott*, 233 U. S. 658, 665.

Actually, Questions 1 and 2 were first raised by appellant in his "Petition for Rehearing After Decision by the Supreme Court," and said petition was denied without opinion. Those questions, therefore, are not now reviewable here since they were not seasonably presented or expressly passed upon in the court below. *Radio Station WOW v. Johnson*, 326 U. S. 120, 128.

B. Questions 4 and 6 Concerning the So-Called "Public Purposes" Restriction and Its Contemplated Removal.

Apart from his discussion of Questions 1 and 2, appellant has presented an argument only on the points embraced in his Questions 4 and 6. All of the remaining Questions Presented—*i. e.*, Questions 3, 5 and 7—remain posed but unargued. Accordingly, we turn next to consider Questions 4 and 6 in which appellant challenges the constitutional validity of the contract by reason of the provision for the removal of a deed restriction**

*California Constitution, Art. I, Sec. 13.

**In passing, we note that appellant's Questions 3 through 7 are each stated in terms of whether the City Council and its Mayor violated the federal Constitution "in approving" (or "in adopting") the ordinance. As previously noted (*supra*, pp. 4 and 6), the ordinance did not "take effect" until the results of the referendary election were declared by the City Council, almost twenty months after the Council adopted and the Mayor approved the ordinance. Thus, as articulated by appellant, his Questions 3 through 7 present issues as to the constitutional validity of a single intermediate step in the legislative process of the City of Los Angeles. As an example in the federal field, we believe it is clear that the constitutional validity of a congressional enactment could not arise prior to presidential approval of the Act. For the same reason, we believe it is clear that appellant's questions, in the form presented, are not reviewable here.

Insofar as appellant invokes the Fourteenth Amendment (Question 4), the question was clearly not timely raised, for it was posed for the first time on petition for rehearing and was not expressly passed upon. *Radio Station WOW v. Johnson, supra*, 326 U. S. 120, 128. The point with reference to Article I, section 10 of the Constitution (Question 6), is the only federal question which might be thought to have been was timely raised by appellant in the California Supreme Court prior to its decision of January 13, 1958.* But it, like the other questions now sought to be raised, was and is devoid of substance.

The California Supreme Court considered appellant's contention that the City did not have power to sell to a private corporation land held by the City subject to a public purpose deed restriction. The court stated with respect to the removal of the deed restriction:

> "This contention relates to land acquired from the Housing Authority of the City of Los Angeles by a deed containing a restriction reading, in part, 'to be used for public purposes only; and not to be used directly or indirectly by the City of Los Angeles, or its grantees, successors in interest, assigns, or any

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*Appellant did not raise this question in his points and authorities in opposition to the petition for prohibition. (Clk. Tr. v. I, filed Aug. 25, 1958.) And he filed no answer or demurrer to the petition by way of a return to the alternative writ issued by the court below on October 16, 1958. (Clk. Tr. v. I.) See California Code of Civil Procedure, §§ 1104, 1105, 1089; Rule 56(c) of Rules on Original Proceedings in Reviewing Courts, 50 Cal. 2d 43. The only mention by appellant of a claim based upon Article I, section 10 of the federal Constitution is found in the appendices of a brief he filed in the California Supreme Court after the hearing in that court. (Clk. Tr. v. I, Brief of Kirshbaum in opposition to writ, filed Dec. 11, 1958, pp. B-17, B-28 and F-25 through F-28.) Although the court below granted leave to file that brief (Clk. Tr. v. I, Transcript of Oral Argument, p. 41), it is doubtful that an argument based upon federal law in the appendix thereof suffices to draw into issue a federal claim. *Cf., Zadig v. Baldwin*, 166 U. S. 485, 488.

other person or persons whatsoever claiming by, through or under the City of Los Angeles, for a period of 20 years from and after the date hereof, for residential development or residential subdivision.' The city, as we have seen, agrees to use its best efforts to have the restriction eliminated or modified to permit the use contemplated by the club, and it is provided that if the city is unable to have the restriction changed, the contract shall be of no further effect.

"The grantor did not intend by this provision to prohibit the city from selling the property; the provision contains no such limitation and plainly contemplates the possibility of a sale in that the restriction is made applicable to use of the property by the 'grantees' and 'assigns' of the city. . . ." (J. S. App. 12.)

And in its subsequent opinion in *Ruben v. City of Los Angeles* and *Kirshbaum v. Housing Authority*, the California court said further on this subject:

"The deed from the Housing Authority to the city, in addition to providing that the land was to be used for public purposes only, declared that the property was not to be used directly or indirectly by the city or its 'grantees, successors in interest, assigns, or any other person or persons whatsoever' claiming under the city for a period of 20 years for residential development. This language clearly shows that the city may make transfers to 'grantees' and 'assigns' as well as to its successors. The deed also implies that after the 20-year period the property may be used by the city's grantees for private residential purposes, that the city's grantees could at any time use the property

> for private purposes other than residential, and that the general restriction to public purposes, if not mere surplusage, was intended to apply only while the city retained the land." (App. 4.)

That construction of the deed by the California Supreme Court was in all respects reasonable and proper and should not be disturbed by this Court. *Millsaps College v. Jackson*, 275 U. S. 129, 132. It follows that appellant's contentions regarding the public purpose deed restriction are unsubstantial. His Question 4 expressly proceeds on the assumption—flatly contrary to the holding of the court below—that the deed prohibits the City from conveying such land to a private corporation for a private use. His Question 6 depends upon the same erroneous assumption.

Moreover, appellant has also failed to show any justiciable right as to which he is entitled to seek protection under the Constitution of the United States. It is clear under the decisions of both this Court and the courts of California that a taxpayer has no vested or proprietary interest in public funds or property.* *Schenebeck v. McCrary*, 298 U. S. 36; *cf., Farmers and Mechanics Savings Bank v. Minnesota*, 232 U. S. 516, 524; and see *City of Glendale v. Crescenta Mutual Water Co.*, 135 Cal. App. 2d 784, 795. A taxpayer's rights are limited to preventing any misapplication of public property. *City of Glendale v. Crescenta Mutual Water Co., supra.* Here, far from any suggestion of misapplication, the removal of the deed restriction is being brought about pursuant to a con-

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*Appellant apparently recognizes that his claim regarding the deed restriction assumes (albeit erroneously) that, as a taxpayer, he has "vested contractual rights" in the property involved. (J.S. 28.)

tract held by the highest court of the state to be for a public purpose and hence for the benefit of the citizens and taxpayers whom the City represents.*

Furthermore, where a charter city such as Los Angeles holds property in fee, whether charged with a public use or not, it is settled California law that the municipality may deal with it as it sees fit, subject only to the limitations and restrictions of its own charter. *Wiley v. City of Berkeley,* 136 Cal. App. 2d 10, 14, 15. Here, as the state Supreme Court was careful to point out, the charter not only did not *restrict* the right to transfer the property in question, it *authorized it.* (J.S. App. 11, 12.) This power reserved to the City by its charter plainly may not be denied by its own taxpayers. The result is that if and when the Housing Authority** gives *its* consent to the removal of the restriction, the last vestige of right to have the restriction enforced will have disappeared.

C. Question 3 Concerning the Utilization of Tax Moneys for the Asserted Purpose of Acquiring and Conveying Land to a Private Corporation.

Although applicant has made no argument in his Jurisdictional Statement in support of his Question 3, we nevertheless turn to it to show why it, too, does not merit review in this Court.

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*If the imposition of the restriction as between the Housing Authority and the City created a contract, appellant, as a member of the general public, can hardly be said to be a party to it. *Cf., Walsh v. Columbus, Hocking Valley & Athens R. Co.,* 176 U. S. 469.

**The Housing Authority is a state agency. Calif. Health & Safety Code, secs. 34200 *et seq.* The California Supreme Court held that, under state law, that agency has power to remove the deed restriction. *Ruben v. City of Los Angeles, Kirshbaum v. Housing Authority.* (App. 6-7.) See Calif. Health & Safety Code, sec. 34315; *cf., Reichelderfer v. Quinn,* 287 U. S. 315.

Question 3 was likewise first raised by appellant on rehearing in the court below. The question is thus not now reviewable here. *Radio Station WOW v. Johnson*, 326 U. S. 120, 128.

Furthermore, the question is without substance. It suggests that the contract is invalid under the due process clause of the Fourteenth Amendment in that one of its provisions requires the City to use its best efforts to acquire at a reasonable cost approximately 115 acres of additional land and convey it to the Ball Club along with the basic property. Thus, appellant seizes upon an isolated provision in the contract without regard to the contract as a whole. But significantly appellant nowhere attacks the holding below that the contract *as a whole* would serve legitimate public purposes. In this regard, the Supreme Court of California stated:

> "In considering whether the contract made by the city has a proper public purpose, we must view the contract as a whole, and the fact that some of the provisions may be of benefit only to the baseball club is immaterial, provided the city receives benefits which serve legitimate public purposes. (Cf. *City of Oakland v. Williams*, 206 Cal. 315, 319 et seq. [274 P. 328]; *County of Los Angeles v. LaFuente*, 20 Cal. 2d 870, 876-877 [129 P. 2d 378].) The transfer of Wrigley Field from the ball club to the city and the construction by the club on the 40-acre parcel of recreational facilities to be used by the city for 20 years, together with maintenance of the facilities for that period, are obviously for proper public purposes. * * *" (J.S. App. 8-9.)

In declining to attack that holding as to public purpose, appellant apparently realizes that "the requirements of due

process leave free scope for the exercise of a wide legislative discretion in determining what expenditures will serve the public interest" (*Carmichael v. Southern Coal Co.*, 301 U. S. 495, 514); that the question whether an "expenditure serves a public purpose is a practical question addressed to the law-making department, and would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court" (*Id.*, at 515); and that the authority of this Court to strike down "state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one" is one which is "exercised with the most extreme caution" (*Everson v. Board of Education*, 330 U. S. 1, 6).

It being undisputed here that the contract authorized by the ordinance would benefit the City and would serve legitimate public purposes, any claim that one of the provisions of the contract and ordinance is unlawful because *by itself* not beneficial to the public is plainly unsubstantial. "The end being legitimate, the means is for the legislature to choose." *Carmichael v. Southern Coal Co., supra*, 301 U. S. at 518. The court below was patently correct when it said:

> "In our opinion the city can properly agree that, in return for legitimate benefits which it will receive under the contract, it will use its best efforts to acquire additional land to convey as part of the consideration to be furnished by it, even though the city is in effect agreeing to purchase land for the purpose of selling it immediately thereafter to a private corporation. If the city had so desired, it clearly could have added to the contract price, in cash, the reasonable value of the additional land which it agreed to use

its best efforts to acquire, and there is no essential difference if the city, instead of paying the amount in cash, uses the money to acquire property and then conveys the property as part of the contract consideration. Section 2(11)(1) of the city charter authorizes the city to buy 'anything useful or convenient' in connection with the exercise of the city's powers. While a city may not purchase land when no public use or purpose is involved, in the present case the additional land is to be acquired for a proper public purpose, namely, that of furnishing the type of contract consideration which enables the city to enter into a bargain which it deems advantageous. . . . This case does not present the situation of a municipal government which seeks to purchase property for the purpose of making a gift of it to a private enterprise or of otherwise improperly using city funds to aid private persons, because the property which the city is to endeavor to buy, if acquired, will not be given away to anyone but will be used as part of the consideration of a contract entered into for a legitimate public purpose." (J.S. App. 10-11.)

D. Question 5 Concerning the Asserted Delegation to a Private Corporation of the Power to Determine the Manner in Which Tax Money Is to Be Spent.

Question 5, which appellant also has not supported by any argument, concerns the provision in the contract (par. 3) which provides that prior to the passage of title of the land to be conveyed by the City to the Dodgers, the City will spend up to $2,000,000 to place the property in a proper condition to be conveyed, "the manner in which such money will be spent for such purposes to be designated by Ball Club." The assumption in appellant's ques-

tion—that that provision gives the Dodgers "unlimited power" to determine how the money is to be spent—is shown to be incorrect by the opinion below. The Supreme Court of California held that no expenditures could be made under that provision which were not consistent with the general purposes of the contract. The court stated:

> "We find no merit to the claim that the city has attempted to make an illegal delegation to a private corporation of the duties of the city council by agreeing that, prior to passage of title, the city shall spend $2,000,000 to place the Chavez Ravine property 'in a proper condition to convey to' the ball club, the manner in which the money will be spent for such purpose to be designated by the club. *It seems obvious that the city could not be required by the ball club, under this provision, to make any expenditures not in accord with the general purposes of the contract.* The city could have paid the money to the club outright, as part of the contract consideration, without retaining any control over the manner or purpose for which the money should be spent, and the arrangement by which *the city will keep possession of the money until it is spent and, in addition, retain some control of how it is spent,* is an advantage to the city which does not militate against the validity of the contract." (J.S. App. 13; emphasis supplied.)

That construction of the contract makes it clear that no federal issue of substance is presented by Question 5.

In any event, it is again sufficient to note that this question was first raised by appellant in his petition for rehearing, which was denied without opinion.

E. Question 7 as to the Asserted Tax Exemption.

The factual background for this contention is simple. As security for the Ball Club's engagement to construct and maintain recreational facilities upon a selected 40-acre parcel of the property to be conveyed, the City is to retain title to the parcel for 20 years. Then, after performance by the Ball Club, the City is to convey the property without further consideration. (Contract, par. 1(c).) During the 20-year period, the City will be the owner of the property and will have general control of the recreational facilities to be bought, paid for, and maintained by the Ball Club. Title will not vest in the Dodgers until the expiration of that period and it will only vest then upon performance of the conditions precedent.

The conjuring up of a *tax exemption* to the Dodgers under this situation is wholly fanciful. One is not *exempt* from the payment of taxes on property which he does not own; the property is simply not *taxable* to him.

Furthermore, the questions of exemptions from state taxation is wholly a matter of state policy. Even if we were to assume, contrary to the fact, that the provisions of the contract under discussion may be regarded as state action creating an exemption as to the Dodgers, this would still confer no rights upon appellant under the Fourteenth Amendment. *Missouri v. Dockery,* 191 U. S. 165.

Finally, this question, too, was first raised in appellant's petition for rehearing, which, as previously noted, was denied by the Supreme Court of California without opinion. The question is therefore not now open to review.

Conclusion.

For the foregoing reasons, Appellee Los Angeles Dodgers, Inc. urges that the appeal herein should be dismissed. If the papers whereon the appeal was taken are to be treated as a petition for certiorari pursuant to 28 U. S. C. Section 2103, certiorari should be denied.

Respectfully submitted,

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July, 1959.

APPENDIX.

Opinion of the Supreme Court of the State of California.

[L. A. No. 25238. In Bank. Apr. 21, 1959.]

JULIUS RUBEN et al., Plaintiffs and Respondents, v. CITY OF LOS ANGELES et al., Appellants.

[L. A. No. 25239. In Bank. Apr. 21, 1959.]

LOUIS KIRSHBAUM, Plaintiff and Appellant, v. THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES et al., Defendants and Respondents; CITY OF LOS ANGELES et al., Defendants and Appellants.

[1] **Municipal Corporations—Contracts—Construction.**—A deed from a city Housing Authority to the city which, in addition to providing that the land was to be used for public purposes only, declared that the property was not to be used directly or indirectly by the city or its "grantees, successors in interest, assigns, or any person or persons whatsoever" claiming under the city for a period of 20 years for residential development clearly shows that the city may make transfers to "grantees" and "assigns" as well as to its successors, and implies that after the 20-year period the property may be used by the city's grantees for private residential purposes, that the city's grantees could at any time use the property for private purposes other than residential, and that the general restriction to public purposes, if not mere surplusage, was intended to apply only while the city retained the land.

[2] **Prohibition—Determination—Scope and Effect.**—A prior decision of the Supreme Court restraining the superior court from enforcing a preliminary injunction or taking further action in a taxpayer's suit to enjoin certification of the result of a referendum election in which a majority of the voters favored adoption of an ordinance authorizing a contract between the city and a baseball club to erect a stadium on land which the city Housing Authority had deeded to the city, that the grantor, in providing that the land was to be used for public purposes only and was not to be used by the city's grantees or successors in interest for a period of 20 years for residential development, did not intend to prohibit the city from selling the property necessarily included a determination that the deed did not operate as a dedication to public use or as the creation of a trust binding on grantees of the property, and that the Housing Authority could properly release any interest it retained; and the prior decision thus foreclosed the taxpayer's contentions in his subsequent suit that the property was dedicated to a public use, that the land was held in trust by the city for the public, that the city had no power to abandon or sell it to a private corporation, and that the Housing Authority could not subsequently qualify the terms of the conveyance.

[3] **Id.—Determination—Scope and Effect.**—Although a city Housing Authority was not a party to a prior prohibition proceeding in which the Supreme Court determined that the provisions of a deed from the Housing Authority to the city permitted the city to sell the conveyed property free from any public use or trust and that the deed did not preclude the Housing Authority from releasing any interest it may have retained, the Housing Authority was entitled, in a taxpayer's suit to prevent execution and enforcement of a contract between the city and a baseball club to erect a stadium on land which the Housing Authority had conveyed to the city, to rely on such determination, because the issue of whether the deed amounted to a dedication was decided in the prohibition proceeding and, in view of the fact that the taxpayer had his day in court, he could not relitigue the matter.

[4] **Housing—Housing Authorities Law—Powers and Duties.**—Under Health & Saf. Code, § 34315, subd. (e), providing that a housing authority may sell, lease, exchange, transfer, assign, pledge or dispose of any real property "or any interest in it," a city Housing Authority was authorized to release to the city any interest retained under a deed from the Housing Authority to the city.

[5] **Municipal Corporations—Remedies of Taxpayers.**—In actions by taxpayers of a city to prevent execution and enforcement of a contract between the city and a baseball club for erection of a stadium on land which had been conveyed to the city, a contention that a parcel of land in a park to be conveyed to the baseball club pursuant to the contract was subject to control of the city's Department of Recreation and Parks under the city charter was premature where it did not appear that any actual sales or transfers of property to the baseball club had yet been made and the city still had opportunity to comply with charter requirements, and where, at the time of trial, proceedings were pending before the city council to transfer the parcel in question from the jurisdiction of the park department on the ground that freeway construction cut off the property from the balance of the park.

[6] **Appeal—Appellate Jurisdiction—Moot Questions.**—A cross-appeal by a city taxpayer who obtained a judgment against the city and a baseball club in his action to prevent execution and enforcement of a contract between the city and the club on land which had been conveyed to the city, but who filed the cross-appeal without any explanation or specification of error, became moot and should be dismissed in view of the conclusion in the appeal of the city and the club, that he was entitled to any relief, even if it be assumed that he could have brought himself within some exception to the general rule that a party cannot appeal from a judgment in his favor.

APPEAL from judgment of the Superior Court of Los Angeles County. Arnold Praeger and Kenneth C. Newell, Judges. Affirmed in part and reversed in part with directions.

Actions by taxpayers of a city against city and city Housing Authority to prevent execution and enforcement of a contract between the city and a baseball club. Judgment for defendant Housing Authority and its commissioners, affirmed; judgments against other defendants reversed with directions.

Phill Silver for Plaintiff and Appellant.

Roger Arnebergh, City Attorney, Bourke Jones, Assistant City Attorney, Weldon L. Weber, Deputy City Attorney, Joe Crider, Jr., O'Melveny & Myers and Pierce Works for Defendants and Appellants.

Julius Ruben, in pro. per., for Plaintiffs and Respondents.

James J. Arditto for Defendants and Respondents.

GIBSON, C. J.—These two actions were brought by taxpayers of the City of Los Angeles to prevent execution and enforcement of the contract between the city and the Brooklyn National League Baseball Club, Inc., which was considered by this court in *City of Los Angeles v. Superior Court, ante,* *p. 423 [333 P.2d 745]. Plaintiffs seek a declaration that the contract and the ordinance authorizing it are invalid and an injunction against the doing of any acts to carry out the ordinance and the contract. Kirshbaum also seeks an injunction restraining the Housing Authority from extinguishing a restriction contained in a deed by the Authority to the city of certain land involved in the contract.

A general demurrer of the Housing Authority and its commissioners was sustained in the Kirshbaum case, and a judgment was entered decreeing that Kirshbaum take nothing against them. After trial with respect to the remaining defendants a judgment was rendered in each case enjoining the execution of the contract and the carrying

*Advance Report Citation: *Ante,* p. 425.

out of the provisions of the ordinance. These defendants, including the city and the baseball club, have appealed from the judgments against them. Kirshbaum has taken a cross-appeal from the judgment in his favor, and, in addition, he has appealed from the judgment in favor of the Housing Authority.

Kirshbaum's complaint, insofar as concerns the relief sought against the Housing Authority, alleges that in 1955 the Housing Authority conveyed to the city the fee to 160.62 acres of land in Chavez Ravine, that this land is a portion of the land to be transferred to the baseball club by the city under the contract referred to above, and that the deed provided that the property was granted to the city "to be used for public purposes only." It is alleged that the Housing Authority is about to take steps to eliminate the public purpose limitation, and the complaint seeks to enjoin removal of the restriction.

[1] The deed from the Housing Authority to the city, in addition to providing that the land was to be used for public purposes only, declared that the property was not to be used directly or indirectly by the city or its "grantees, successors in interest, assigns, or any other person or persons whatsoever" claiming under the city for a period of 20 years for residential development. This language clearly shows that the city may make transfers to "grantees" and "assigns" as well as to its successors. The deed also implies that after the 20-year period the property may be used by the city's grantees for private residential purposes, that the city's grantees could at any time use the property for private purposes other than residential, and that the general restriction to public purposes, if not mere surplusage, was intended to apply only while the city retained the land.

Any doubt as to the proper construction of the instrument and the rights of the city and the Housing Authority thereunder was resolved in *City of Los Angeles v. Superior Court*, **ante*, pp. 423, 435-437 [333 P.2d 745], where both Ruben and Kirshbaum appeared. In that case we granted a writ of prohibition restraining the superior court from

*Advance Report Citation: *Ante*, pp. 425, 437-438.

enforcing a preliminary injunction or taking further action in a suit to enjoin certification of the result of a referendum election in which a majority of the voters favored adoption of the ordinance authorizing the contract.[1] We held that the grantor did not intend by the restriction to prohibit the city from selling the property and that the city could sell it pursuant to section 393 of the charter which, with certain exceptions not pertinent to this question, permits property no longer required by the city to be sold upon such terms and conditions as the council prescribes by ordinance. We further held, in determining the validity of the city's promise to use its best efforts to have the deed restriction removed, that any possibility that the Housing Authority may have a right to complain of a termination of the public use will disappear if the city is able to obtain the Housing Authority's consent to eliminate the restriction.

[2] Our decision in *City of Los Angeles v. Superior Court, ante,* †p. 423 [333 P.2d 745], forecloses Kirshbaum's contentions that as a result of the deed restriction the property was dedicated to a public use, that the land is held in trust by the city for the public, that the city has no power to abandon or sell it to a private corporation, and that the Housing Authority cannot qualify the terms of the conveyance by any subsequent act or declaration. The holding in that case necessarily included a determination that the deed did not operate as a dedication to a public use or as the creation of a trust binding upon grantees of the property, and it likewise included a determination, insofar as concerns the character of the instrument, that the Housing Authority may properly release any interest which it retains under the deed and that such a release will be effective to permit the city to proceed with the contemplated sale to the baseball club.

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[1]Although the binding effect of a prior judgment is a defense that must ordinarily be pleaded and proved (Code Civ. Proc., § 1962, subd. 6), where the judgment in one suit becomes final while an appeal is pending from the judgment in another action, the first final judgment may be brought to the attention of the court in which the appeal is still pending and may be relied on as res judicata (see *Domestic & Foreign Petr. Co. v. Long,* 4 Cal.2d 547, 562 [51 P.2d 73]; 3 Witkin, California Procedure (1954) 1935).

†Advance Report Citation, *Ante,* p. 425.

[3] The Housing Authority, although not a party to the prohibition proceeding, is entitled in the present action by Kirshbaum to rely upon the prior determination, because the issue of whether the deed amounted to a dedication was decided there and, in view of the fact that Kirshbaum had his day in court, he cannot now reargue the matter. (*Bernhard v. Bank of America*, 19 Cal.2d 807, 811 *et seq.* [122 P.2d 892].)

Since we have decided in *City of Los Angeles v. Superior Court, ante*, *p. 423 [333 P.2d 745], that the provisions of the deed permitted the city to sell the conveyed property free from any public use or trust and that the deed did not preclude the Housing Authority from releasing any interest which it may have retained, we are not governed here by cases which hold that a conveyance of property to a city for a specific purpose, i.e., for a park or a street, may by reason of the language in the deed amount to a dedication to a public use irrevocable by either the grantor or the city. (See *Wattson v. Eldridge*, 207 Cal. 314, 318-320 [278 P. 236]; *Slavich v. Hamilton*, 201 Cal. 299, 302 et seq. [257 P. 60]; *Archer v. City of Salinas*, 93 Cal. 43, 49 et seq. [28 P. 839, 16 L.R.A. 145]; *Washington etc. Co. v. City of Los Angeles*, 38 Cal.App. 2d 135, 136-138 [100 P.2d 828]; *Lowell v. City of Boston*, 322 Mass. 709 [79 N.E.2d 713, 725-726].)[2]

[4] In our prior decision we expressly withheld consideration of the question whether or not the Housing Authority has power, i.e., the legal capacity under applicable statutes regulating its powers and duties, to execute a release of its rights under the deed restriction. (*Ante*, at †pp. 436-437.) Kirshbaum's complaint, however, contains no allegations that would permit a conclusion that the Housing Authority lacks such power. On the other hand,

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*Advance Report Citation: *Ante*, p. 425.

[2]It may be noted, however, that in these cases property was transferred to a municipal corporation for a single, specified public purpose, unlike the transfer generally, for all "public purposes," made by the Housing Authority's deed, and that none of the conveyances in these cases contained language like that in the deed involved here which shows that the city may dispose of the property to "grantees" or "assigns."

†Advance Report Citation: *Ante*, pp. 425, 438.

subdivision (e) of section 34315 of the Health and Safety Code provides that a housing authority may sell, lease, exchange, transfer, assign, pledge, or dispose of any real property "or any interest in it." This legislation is ample to permit the Housing Authority to release to the city any interest retained under the deed.

It follows from what we have said that no cause of action has been stated against the Housing Authority and that the trial court properly sustained the general demurrer.

With one exception all of the questions relating to the judgment in the Ruben and Kirshbaum cases which enjoined execution and enforcement of the contract were resolved against the taxpayers by our decision in *City of Los Angeles v. Superior Court, ante,* *p. 423 [333 P.2d 745]. [5] Kirshbaum contends that a parcel of land in Elysian Park to be conveyed to the baseball club pursuant to the contract is subject to the control of the city's Department of Recreation and Parks, that under section 393 of the city charter[3] such land may be sold only with the approval of the board or officer having the management of that department, and that no such approval has been obtained. The contention, not determined in the prohibition case, is premature, because it does not appear that any actual sales or transfers of property to the baseball club have yet been made, and the city still has the opportunity to comply with these requirements of the charter. Moreover, at the time of trial herein, proceedings were pending before the city council to transfer the parcel in question from the jurisdiction of the park department on the ground that freeway construction cut off the property from the balance of Elysian Park, and, if such a transfer is accomplished, consent of the department to a sale will no longer be necessary. (See Los Angeles City Charter, § 170, subd. (d), prescribing procedure for such transfers.)

*Advance Report Citation: *Ante,* p. 425.

[3]Section 393 of the charter provides, in part, that "any real property proposed to be sold that is under the control of any board or commission authorized by this charter or by law to acquire, hold or control real property shall not be sold except at the request or with the approval of the board, commission or officer having the management of such department. . . ."

It follows from the foregoing that the judgments enjoining execution and enforcement of the contract must be reversed. [6] Kirshbaum's notice of cross-appeal from the judgment which he obtained against the city and the baseball club states, without any explanation or specification of error, that he thereby cross-appeals to this court from the whole of that judgment. In view of our conclusion that he is not entitled to any relief, his cross-appeal has become moot and should be dismissed, even if we assume that he could have brought himself within some exception to the general rule that a party cannot appeal from a judgment in his favor. (See for the general rule, *Maxwell Hardware Co. v. Foster*, 207 Cal. 167, 170 [277 P. 327]; 3 Witkin, California Procedure (1954), 2182.)

The judgment in favor of the Housing Authority and its commissioner is affirmed. The judgments against the other defendants are reversed with directions to enter judgments in their favor in accordance with this opinion and the decision in *City of Los Angeles v. Superior Court*, *ante*, *p. 423 [333 P.2d 745]. The cross-appeal of plaintiff Kirshbaum is dismissed.

Shenk, J., Traynor, J., Schauer, J., Spence, J., McComb, J., and Peters, J., concurred.

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*Advance Report Citation: *Ante*, p. 425.

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JUL 22 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959
No. 155

LOUIS KIRSHBAUM,
Appellant,

vs.

THE CITY OF LOS ANGELES, a municipal corporation, and THE COUNCIL OF THE CITY OF LOS ANGELES,
Appellees.

On Appeal From the Supreme Court of the State of California.

MOTION OF APPELLEES TO DISMISS.

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IN THE

Supreme Court of the United States

October Term, 1959

No. 155

LOUIS KIRSHBAUM,

Appellant,

vs.

THE CITY OF LOS ANGELES, a municipal corporation, and THE COUNCIL OF THE CITY OF LOS ANGELES,

Appellees.

On Appeal From the Supreme Court of the State of California.

MOTION OF APPELLEES TO DISMISS.

The City of Los Angeles, a municipal corporation, and The Council of The City of Los Angeles, petitioners below and appellees herein, respectfully move that the appeal of Louis Kirshbaum in this cause be dismissed under Rule 16, subsection 1, paragraph (b) upon each of the following grounds:

1. The appeal does not present a substantial federal question;
2. The federal questions sought to be reviewed were not timely or properly raised, or expressly passed on by the California Supreme Court;
3. The judgment rests on an adequate nonfederal basis.

Statement of the Case.

The case below is an original proceeding in the Supreme Court of the State of California for the issuance of a Writ of Prohibition to prevent the Superior Court in and for the County of Los Angeles from proceeding further in a case pending in the latter court for declaratory relief to determine the validity of a referendum election held on June 3, 1958, on Ordinance No. 11,204 of The City of Los Angeles and to enjoin the certification of the results thereof. A preliminary injunction was ordered issued by the Superior Court. (Pet. for Writ, pp. 9-11) The California Supreme Court issued an alternative Writ of Prohibition; and, by its judgment, from which appeals are taken by two "real parties in interest," the issuance of a Peremptory Writ of Prohibition was ordered as prayed for. *The City of Los Angeles v. Superior Court*, 51 A. C. 425, 440; 333 P. 2d 745, 753.

Basis of California Supreme Court Decision.

I.

Issuance of the Writ.

In ordering the issuance of the Peremptory Writ of Prohibition the California Supreme Court held:

1. "The writ of prohibition is an appropriate remedy to arrest the proceedings of a court when there is not a plain, speedy, and adequate remedy in the ordinary course of the law and when the proceedings of the court are without or in excess of its jurisdiction. (Code of Civ. Proc., Secs. 1102, 1103.)"

2. "To permit the issuance of prohibition it is not necessary that there be a lack of jurisdiction over

the subject matter or parties in the fundamental sense but only that there be a want or excess of the power of the court as defined by statute or by rules developed and followed under the doctrine of *stare decisis* (*Tide Water Assoc. Oil Co. v. Superior Court,* 43 Cal. 2d 815, 821 [279 P. 2d 35]; *Abelleira v. District Court of Appeal,* 17 Cal. 2d 280, 287 *et seq.* [109 P. 2d 942, 132 A. L. R. 715].)"

3. "Subdivision 7 of section 3423 of the Civil Code and the second subdivision 7 of section 526 of the Code of Civil Procedure provide that an injunction cannot be granted to 'prevent a legislative act by a municipal corporation'. Subdivision 4 of section 3423 of the Civil Code and the second subdivision 4 of section 526 of the Code of Civil Procedure similarly provide that an injunction cannot be granted to 'prevent the execution of a public statute by officers of the law for the public benefit.'"

4. "A court acts in excess of its jurisdiction if it attempts to enjoin the enactment or enforcement of a valid public statute or ordinance." (Citing numerous California citations exclusively.)

5. "Although prohibition should not issue where the propriety of the trial court's action depends upon questions of fact * * * (citing two California decisions) * * * none of the persons attacking the contract has pointed to any evidence which would present a substantial question of fact upon a material issue."

6. "It follows that prohibition will lie to test the validity of the ordinance," and the decision holds the ordinance to be valid.

II.

The Ordinance Involved.

It is alleged in the Petition for Writ of Prohibition, (Par. X, p. 11) and not denied, that the Superior Court's actions were "based solely upon an attack upon the validity of Ordinance No. 110,204 from the standpoint of the authority of The City of Los Angeles to enter into and perform the contract as set forth and authorized in said ordinance."

Under the contract authorized by Ordinance No. 110,204 *City will*

1. Convey 185 acres, more or less, of land presently owned by it in Chavez Ravine and use its best efforts to acquire, at a reasonable cost, and convey additional land to make a total of 300 acres, more or less, reserving (a) all mineral rights which it now owns or may hereafter acquire, and (b) a drill site not to exceed 5 acres, the location thereof to be mutually agreed upon by the City and the Ball Club, which will not interfere with the Ball Club's operations. (1.)*

2. Retain title, for 20 years, to 40 acres of the 300 acre parcel to assure performance by the Ball Club of its policy of providing and maintaining recreational facilities and convey same to the Ball Club or its nominee at the end of such period, in the event such policy and terms of this agreement pertaining to recreational facilities on the 40 acres have been faithfully performed. (1(c).)

3. Make conveyance free and clear of any deed restriction on use, and use its best efforts to have elimi-

*Numbers in parenthesis refer to paragraphs of the contract set forth in the ordinance.

nated or modified to permit the use contemplated by the Ball Club, the provision in the deed from the Housing Authority reading:

> "To be used for public purposes only; and not to be used directly or indirectly by the City of Los Angeles, or its grantees, successors in interest, assigns, or any other person or persons whatsoever claiming by, through or under the City of Los Angeles, for a period of 20 years from and after the date hereof, for residential development or residential subdivision." (1(d).)

4. Upon conveyance, commence street vacation proceedings, upon demand of the Ball Club, as to existing public streets which will no longer be needed for present or future street purposes and deliver any title which may remain in City, without any further consideration. (2.)

5. Prior to conveyance of any property, expend $2,000,000 to place such property in a proper condition to convey to Ball Club, or its nominee, the manner in which such money will be spent for such purpose to be designated by Ball Club. (3.)

6. Provide such public streets as may be needed within the periphery of the area to be acquired, the cost thereof other than the cost of acquiring necessary land, to be a part of th. $2,000,000 mentioned above. (4.)

7. Initiate proceedings for the purpose of rezoning the property to be conveyed to the Ball Club to "C-3" and for granting of "a conditional use permitting its use for a baseball stadium as herein provided." (7 Par. 2.)

8. Make demand upon the County of Los Angeles to furnish the funds heretofore or hereafter voted and or appropriated for the construction of necessary access

roads, including acquisition of rights of way therefor, and will proceed diligently with the construction of such access roads in the event the County makes funds therefor available to the City. (Last Par.)

9. Place one-half of all monies, payments, royalties or other consideration received by the City from mineral rights reserved in property to be conveyed by City and mineral rights in Wrigley Field conveyed by the Ball Club to the City, in a special trust fund to be expended solely for the purpose of providing and maintaining recreational facilities to promote the youth program of the Ball Club, the location and type of such recreational facilities to be mutually agreed upon by the City and the Ball Club, with the approval of the City Council by ordinance. (1(b) and 5.)*

BALL CLUB *will*

1. Convey to the City the land and improvements known as Wrigley Field, including all mineral rights. (5.)

2. Construct on the property conveyed by the City "at Ball Club's cost and expense, a modern baseball stadium, seating not less than 50,000 people." (6.)

3. Move to Los Angeles "the present Brooklyn National League Baseball franchise and ball team known as the 'Dodgers'." (7.)

4. Construct recreational facilities costing not to exceed a half million dollars on the 40-acre portion of the

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*As pointed out in the California Supreme Court decision:

"The ball club has given formal notice to the city that the club has waived and relinquished all rights conferred upon it under these provisions and has assigned to the city all such rights. The provisions being solely for the benefit of the club, it could properly waive them, and there is no longer any reason to treat them as parts of the contract." (51 A. C. 425, 434, 333 P. 2d 745, 749.)

property to be conveyed by the City, such recreational facilities to be mutually agreed upon by the City and Ball Club prior to conveyance of the property, and constructed simultaneously with the stadium. (7th Whereas Par.)

5. Maintain the recreational facilities on the 40-acre parcel for 20 years at an annual cost of $60,000, but not furnish personnel, and in the event the cost of maintenance does not amount to $60,000 in any year, pay the balance to the City "so that it may be used by City for the providing of or maintaining recreational facilities elsewhere in said City." (7th Whereas Par.)

The foregoing obligations are subject to the following:

1. The recreational facilities on the 40-acre parcel are to be under the control of the City; however, the City shall not permit the scheduling of any event at any of the recreational facilities which would involve the concentration of a large number of participants or spectators at times when the Ball Club has scheduled an event at the baseball stadium, at which time the Ball Club will have the right to use any facilities suitable for parking as may be provided on the 40-acre parcel. (7th Whereas Par.)

2. Any violation of the terms of the agreement with reference to the recreational facilities shall not invalidate or affect any transfers of land which theretofore have been made pursuant to the agreement. (1(c).)

3. In the event the City is unable to have the deed from the Housing Authority modified to eliminate the provision for public use only, the contract shall be of no further force or effect. (1(d).)

4. The agreement is made in reliance upon the action of the Board of Supervisors of Los Angeles County in

adopting the resolution attached as Exhibit B thereto, providing for furnishing funds up to $2,740,000 to construct necessary access roads. (Next to last Par.)

The declarations contained in the ordinance and the contract are to the effect that:

1. The Contract would be highly beneficial to the City and the inhabitants and taxpayers thereof, and to the public, and is useful and convenient in connection with the exercise of the City's rights and powers. (Introductory Ordinance Recital.)

2. The City is the owner of certain property in Chavez Ravine and is in the process of acquiring additional property in the area and this property is no longer required for the use of the City and its return to the tax rolls would produce substantial additional property tax revenues to the City. (1st, 2nd and 3rd Whereas Par.)

3. The Ball Club is willing to acquire such property and build at its own expense a major league baseball stadium for the Brooklyn Dodgers and the bringing of major league baseball to Los Angeles would result in direct and indirect benefits to the City and would result in a large additional payroll in this area and it would be highly beneficial to the City, the public and its inhabitants to have such property the site of a major league baseball stadium, and the City would receive substantial tax revenues from sources other than the Ball Club, incident to major league baseball in Los Angeles. (3rd, 5th, 6th and 7th Whereas Par.)

4. The Ball Club is able and willing to have the baseball stadium and grounds known as Wrigley Field conveyed to the City for the property now owned and to be acquired by the City in Chavez Ravine, and Wrigley

Field would be a suitable place for holding various events including, but not limited to, amateur baseball games and similar activities, for which the City is in need, and would be of great value to the City and its inhabitants. (10th to 13th Whereas Par.)

5. The Ball Club has a long-standing policy of admitting juveniles to various games free of charge as a method of combatting juvenile delinquency and stimulating interest in healthful recreational activities, and as part of this policy will construct on the 40-acre parcel the recreational facilities, costing not to exceed a half million dollars, to be mutually agreed upon, which additional recreational facilities are sorely needed by the City and will fill a definite public need and be of great value to the City. (7th to 10th Whereas Par.)

III.

Validity of Contract.

The California Supreme Court held the contract authorized by the ordinance to be valid for the following reasons:

1. "The benefits to be received by the City are apparent, and the adequacy of the consideration, which involves the comparative values of the premises of the parties, is a matter which, in the absence of abuse of discretion, rests in the judgment and discretion of the City Council." (Citing California authorities exclusively.)
2. "There is no merit to the argument that the contract lacks mutuality in that there is no absolute obligation requiring the ball club to purchase the 40-acres to be used for recreational purposes or binding it to pay any amount therefor. * * * The

consideration for this conveyance obviously is to be found in the various obligations which must be performed by the ball club whether or not it accepts the 40 acres."

3. "The contract likewise is not defective because it provides that a violation of the agreement by the ball club regarding its obligations concerning the recreational facilities will not affect any transfer of lands theretofore made. The City is amply protected, in the event of such a default, by the fact that it may continue to retain title to the 40 acres and, in addition, may maintain an action for damages for breach of contract."

4. "The contract is claimed to be void because it contains promises to agree in the future. * * * The reservation of an oil drilling site and the establishment and maintenance of the recreational facilities on the 40-acre parcel are, of course, important features of the contract; but, in our opinion, the uncertainty with respect to the exact location and size of the drilling site and the details with respect to the recreational facilities are matters which should not be treated as rendering the contract void. There is no indication that the city and the ball club are unable to come to an agreement as to them, and, if the parties cannot do so, the court may determine the matters within the test of reasonableness referred to above, in accordance with the general purposes of the contract. Similarly, the court could fix a reasonable rental for Wrigley Field, if this should ever become necessary."

5. "In considering whether the contract made by the city has a proper public purpose, we must view the contract as a whole, and the fact that some of the provisions may be of benefit only to the baseball club is immaterial, provided the city receives benefits which serve legitimate public purposes. * * * (Citing two California cases.) The transfer of Wrigley Field from the ball club to the city and the construction by the club on the 40-acre parcel of recreational facilities to be used by the city for 20 years, together with maintenance of the facilities for that period, are obviously for proper public purposes. In view of these direct benefits, it is unnecessary for us to consider whether the city could properly expend public funds for the various indirect benefits which the public will receive under the contract, such as the bringing to the city of a major league baseball club, the construction by the club of its new stadium, and the return of the Chavez Ravine property to the tax rolls."

6. "When the contract is viewed as a whole, there is no inconsistency, as argued, between the declaration, on the one hand, that the 185 acres of Chavez Ravine property now owned by the city are no longer required for the use of the city and the recital, on the other hand, that 40 acres of the total of 300 to be conveyed to the club are to be used by the city for needed recreational facilities. * * * It is difficult to see anything improper in an agreement by which a city, owning more land than it needs, conveys some of that land in exchange for the construction and maintenance of needed facilities for use by the city over a 20-year period."

7. "In our opinion the city can properly agree that, in return for legitimate benefits which it will receive under the contract, it will use its best efforts to acquire additional land to convey as part of the consideration to be furnished by it, even though the city is in effect agreeing to purchase land for the purpose of selling it immediately thereafter to a private corporation. * * * While a city may not purchase land when no public use or purpose is involved, in the present case the additional land is to be acquired for a proper public purpose, namely, that of furnishing the type of contract consideration which enables the city to enter into a bargain which it deems advantageous. * * * This case does not present the situation of a municipal government which seeks to purchase property for the purpose of making a gift of it to a private enterprise or of otherwise improperly using city funds to aid private persons, because the property which the city is to endeavor to buy, if acquired, will not be given away to anyone but will be used as part of the consideration of a contract entered into for a legitimate public purpose."

8. "It is contended that the city does not have power to sell to a private corporation land held by the city subject to a public purpose restriction imposed by the grantor's deed to the city and that the city has no power to enter into an agreement with a private corporation obligating the city to extinguish such a restriction. This contention relates to land acquired from the Housing Authority of the City of Los Angeles by a deed containing a restriction reading, in part, 'to be used for public purposes

only; and not to be used directly or indirectly by the City of Los Angeles, or its grantees, successors in interest, assigns, or any other person or persons whatsoever claiming by, through or under the City of Los Angeles, for a period of 20 years from and after the date hereof, for residential development or residential subdivision.' * * *

"The grantor did not intend by this provision to prohibit the city from selling the property; the provision contains no such limitation and plainly contemplates the possibility of a sale n that the restriction is made applicable to use of the property by the 'grantees' and 'assigns' of the city. * * * In view of the declaration by the council that the city no longer requires the use of the property, the city's promise to use its best efforts to have the deed restriction removed cannot be said to constitute an illegal agreement to bind the city council to exercise its judgment in the future. Any possibility that the Housing Authority may have a right to complain of a termination of the public use upon a sale by the city will disappear if the city is able to obtain the Housing Authority's consent to eliminate the restriction. Similarly; such a consent will obviate any difficulty with respect to the restriction against residential use of the property. Whether or not the Housing Authority has power to execute, and is willing to execute, a release of its rights under the deed restriction is a question which relates to the performance rather

than to the validity of the contract and is not before us in this proceeding."*

9. "We find no merit to the claim that the city has attempted to make an illegal delegation to a private corporation of the duties of the city council by agreeing that, prior to passage of title, the city shall spend $2,000,000 to place the Chavez Ravine property 'in a proper condition to convey to' the ball club, the manner in which the money will be spent for such purposes to be designated by the ball club. It seems obvious that the city could not be required by the ball club, under this provision, to make any expenditures not in accord with the general purposes of the contract. The city could have paid the money to the club outright, as part of the contract consideration, without retaining any control over the manner or purpose for which the money should be spent, and the arrangement by which the city will keep possession of the money until it is spent, is an advantage to the city which does not militate against the validity of the contract."

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*The California Supreme Court later held in *Ruben v. City of Los Angeles*, 51 A. C. 861, 866 [337 P. 2d 825, 828]:

"In our prior decision we expressly withheld consideration of the question whether or not the Housing Authority has power, *i.e.*, the legal capacity under applicable statutes regulating its powers and duties, to execute a release of its rights under the deed restriction. * * * Kirshbaum's complaint, however, contains no allegations that would permit a conclusion that the Housing Authority lacks such power. On the other hand, subdivision (e) of section 34315 of the Health and Safety Code provides that a housing authority may sell, lease, exchange, transfer, assign, pledge, or dispose of any real property 'or interest in it.' This legislation is ample to permit the Housing Authority to release to the city any interest retained under the deed."

10. "It is contended that the city is illegally agreeing to vacate streets under the provision that the existing public streets in the Chavez Ravine property will no longer be needed for present or future street purposes will be vacated and the city will, upon demand of the ball club, commence proceedings to vacate the streets. * * * The agreement does not purport to control or govern the exercise of the power to determine what streets may no longer be necessary but to provide that, when the determination is made, the city will commence the required statutory procedure. * * * By this part of the contract the city is merely agreeing to do an act which it should do regardless of contract once it determines that there is no longer a need for a particular street."

11. "The contract, however, does not purport to authorize either the city or the ball club to use any of the $2,000,000 to remove a street where such removal has not been duly authorized in appropriate vacation proceedings. If it should be determined in such a proceeding that a particular street remained necessary for public use as a street, the stadium obviously could not be built at that location, but this possibility does not go to the validity of the contract. At most it might render performance impossible, a matter which is not now before us."

ARGUMENT.

I.

The Appeal Does Not Present a Substantial Federal Question.

While appellant's claim that the federal questions are substantial rests only on two grounds, namely, that "in granting prohibition the Supreme Court of California denied appellant due process of law" [Jurisditional Statement, p. 19] and that "the ordinance contravenes the contract clause of the Constitution of the United States" [p. 28], appellee respectfully submits that neither of these two grounds, nor any of the other "Questions Presented" [pp. 4 to 6] are substantial for the following reasons:

1. **The Determination by the California Supreme Court That a Writ of Prohibition Should Issue From That Court to Stay Any Further Proceedings in the Los Angeles Superior Court to Enjoin Declaring the Results of a Referendary Election on a City Ordinance Does Not Present Any Reviewable Question Before the United States Supreme Court.**

Appellant's first and second questions presented on page 4 of his jurisdictional statement, namely, "Did the Supreme Court interfere unconstitutionally with the jurisdiction granted to the Superior Court" and "did the Supreme Court act unconstitutionally in divesting the Superior Court of its power to determine issues of fact or law," thus denying to appellant due process of law "under the Fourteenth Amendent of the United States Constitution," are all matters of local procedure exclusively, under the rule announced in *Gasquet v. Lapeyre*, 242 U. S. 367, 369, that,

> "there is nothing in the clauses of the 14th Amendment guaranteeing due process and equal protection

> which converts an issue respecting the jurisdiction of a state court under the Constitution and statutes of the state into anything other than a question of state law, the decisions of which by the state court of last resort are binding upon this court."

And, also, as stated in *John v. Paullin*, 231 U. S. 583, 585,

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

(a) THE CALIFORNIA SUPREME COURT'S DETERMINATION OF THE ABSENCE OF ANY DISPUTED MATERIAL QUESTION OF FACT WAS MADE AFTER CAREFUL INVESTIGATION AND ITS DETERMINATION IS CONCLUSIVE.

Appellant's claim of the existence of questions of fact made at pages 14 to 19 of his jurisdictional statement was answered in detail in the briefs filed with the California Supreme Court, that court having in fact called for special briefs on this question and made the record on appeal in the *Ruben* and *Kirshbaum* cases tried in the Superior Court a part of the record in the prohibition case in order that the Supreme Court could satisfy itself on this question. (Oral argument before the Supreme Court Nov. 6, 1958 at pp. 38-41.) It did so, as announced in its decision, stating, "none of the persons attacking the contract has pointed to any evidence which would pre-

sent a substantial question of fact upon a material issue." (51 A. C. 432, 333 P. 2d 748-9.) In the language of *Newport Light Co. v. City of Newport*, 151 U. S. 527, 542, "this court is not called upon to review the correctness or incorrectness of this reasoning." Equally applicable is the thought expressed in *United States v. Pink*, 315 U. S. 203, 216:

> "In view of that ruling we are not free to inquire, as petitioner suggests, into the propriety under New York practice of grounding the motion for summary judgment on the record in the Moscow F. Ins. Co. case. That is distinctly a question of state law on which New York has the last word."

The same principle was involved in *Perryman v. Woodward*, 238 U. S. 148, wherein it was stated at page 152:

> "The master to whom the case was referred to take the proof and report his findings of fact and conclusions of law was of opinion that the widow's interest 'was purely that of dower,' and excluded the decree of the probate court. But he attached it to his report and the decree was considered by the courts, as we have indicated. The plaintiffs contend that thereby they have been prevented from introducing evidence to control the effect of the alleged decree. This is a matter of local practice that does not concern us. It was disposed of by the courts of the state."

2. The Determination That Public Funds May Lawfully Be Expended by the City of Los Angeles Involves Only the Construction of a City Ordinance and the Power and Authority of the City of Los Angeles Under the Constitution and Laws of the State of California.

Appellant's Question 3 as to whether the City Council and the Mayor violated "due process of law under the Fourteenth Amendment of the United States Constitution in approving an ordinance for the expenditure of tax funds for the purpose of acquiring and conveying land to a private corporation engaged in a private enterprise for its private profit," besides placing a construction upon the ordinance contrary to that of the California Supreme Court, raises questions solely of construction of the ordinance, determination of the public purpose involved and the power and authority of the City to act under the Constitution and laws of the state. These are not matters to be reviewed in the United States Supreme Court.

In *Green v. Frazier*, 253 U. S. 233, 239, 240, the rule is announced that when the people, the legislature and the highest court of the state have declared the purpose public, "With this united action of people, legislature, and court, we are not at liberty to interfere unless it is clear, beyond reasonable controversy, that rights secured by the Federal Constitution have been violated," which is in harmony with *Jones v. City of Portland*, 245 U. S. 217, and earlier cases therein cited.

Moreover, as pointed out in *Seattle R. & S. Co. v. Washington, ex rel. Linhoff*, 231 U. S. 568, 569, 570, where it was contended that the construction given a municipal ordinance took plaintiff's property without due process of law, "this court does not sit to revise the

construction of documents by state courts * * * and it takes more than a possible misconstruction by a court to make a case under the 14th amendment."

Finally, under *Fischer v. City of St. Louis*, 194 U. S. 361, 369, the authority of The City of Los Angeles under its charter and the constitution and other laws of the state "to adopt the ordinance in question, was settled by the decision of the supreme court, and is not open to attack here." See, also *Gundling v. City of Chicago*, 177 U. S. 183, 185, and *Henderson Bridge Co. v. City of Henderson*, 173 U. S. 592, 614.

3. Whether the City of Los Angeles May Sell to a Private Corporation Land Acquired From the Housing Authority of the City of Los Angeles (a State Agency) by Deed Containing Language Relative to Use for Public Purposes Only and Use Its Best Efforts to Have This Deed Restriction Removed Involve Matters Relating to Construction of the Deed and Power and Authority of the City Under State Law Which Are Not the Subject of Review by the United States Supreme Court nor Is Any Contract Right of Any Member of the Public Involved.

Appellant's Question 4 relative to violation of due process of law under the Fourteenth Amendment of the United States Constitution by the City Council and Mayor "approving an ordinance which proposes to sell land acquired subject to a public purpose Deed Restriction, and convey such land to a private corporation without limitation as to its intended use," is obviously appellant's misinterpretation of the ordinance. The ordinance provides that the "City agrees to use its best efforts to have

such deed restriction eliminated or modified so as to permit the use contemplated by Ball Club; provided that in the event City is unable to have such restriction so eliminated or modified this contract shall be of no further force or effect."

Both Question 4 and appellant's Question 6, did the City Council and the Mayor "violate Article I, Section 10 of the United States Constitution in adopting an ordinance which approves the extinguishment of a public purpose Deed Restriction thus constituting an impairment of contract as against the beneficiaries of the contract, to wit, the citizens of the municipality," involve:

(a) Merely an interpretation of the deed provision and the power of the City to act in the premises which, under *Seattle R. & S. Co. v. Washington, ex rel. Linhoff,* (*Supra*) 231 U. S. 568; and *Fischer v. City of St. Louis,* (*Supra*) 194 U. S. 361, are questions not reviewable in the United States Supreme Court.

(b) Any contract right protected by Section 10 of Article I that may be involved is between the grantor Housing Authority of the City of Los Angeles (a state agency, *Housing Authority v. City of Los Angeles,* 38 Cal. 2d 853, 861) and the grantee City of Los Angeles, as distinguished from individuals forming the public under the rule announced in *Walsh v. Columbus, Hocking Valley & Athens R. Co.,* 176 U. S. 469, 480, it being there said:

> "The only contract in this case was between the state of Ohio and the United States. Plaintiff was

> neither party nor privy to such contract. It was within the power of the government to prosecute the state for a breach of it, or to condone such breach, if it saw fit. As it adopted the latter course, and has deemed it proper to acquiesce in the abandonment of the canals and in the state turning them over to the railroad company, it does not lie in the mouth of the plaintiff to complain. This disposes of every question called to our attention in the briefs of counsel."

So in the case at bar, the deed was between the Housing Authority, a state agency, and The City of Los Angeles, a municipal corporation. The contract was between these two parties only. Appellant "was neither party nor privy to such contract." Therefore he has no contract right to be protected.

Even assuming merely for the sake of argument that there is involved a dedication for public use, there is no violation of contract or other impediment, even as against the grantor, in subsequently abandoning such public use and selling the land as held in *Van Ness v. Mayor, etc. of City of Washington*, 29 U. S. 232, it being stated at page 277, that

> "the opinion of this court certainly is, that under the Act of 1822 the plaintiffs can proceed by a bill in equity in the nature of a petition of right against these the United States only for the money arising from the sales, and cannot claim a decree for the land itself, or for any injunction against sales of it."

4. Determination of the Legality of the Proposed Expenditure of $2,000,000 in Site Preparation of the Land to Be Conveyed by the City Depends Exclusively Upon Interpretation of the Ordinance and the Power of the City to Contract Under State Law.

Appellant's Question 5 attempts to raise a question of due process of law under the Fourteenth Amendment with regard to the provision requiring the City prior to the passage of title to expend $2,000,000 in placing the property in a proper condition for the City to convey to the Ball Club, "the manner in which the money will be expended for such purpose to be designated by the Club."

The California Supreme Court construed this provision and upheld its legality upon the theory that, "It seems obvious that the City could not be required by the Ball Club under this provision to make any expenditures not in accord with the general purposes of the contract: The City could have paid the money to the Club outright as part of the contract consideration, without retaining any control over the manner or purpose for which the money should be expended, and the arrangement by which the City will keep possession of the money until it is expended and, in addition, some control of how it is expended, is an advantage to the City which does not militate against the validity of the contract." It is thus seen that the question resolves itself simply into an interpretation of the ordinance and the power of the City under state law to act in the premise. These are matters which the Supreme Court of the United States will not review under the rule announced in *Seattle R. & S. Co. v. Washington, ex rel. Linhoff,* (*Supra*) 231 U. S. 568 and *Fischer v. City of St. Louis,* (*Supra*) 194 U. S. 361.

Also, as stated in *Kovacs v. Cooper*, 336 U. S. 77, 84, 85, "Although this Court must decide for itself whether federal questions are presented and decided, we must accept the state court's conclusion as to the scope of the ordinance."

5. The Tax Structure of a State Designating the Property to Be Taxed and Exemptions From Taxation Is Purely a State Affair of Which the United States Supreme Court Will Refrain From Passing Upon.

Appellant's Question 7, did the City Council and Mayor violate the equal protection under the Fourteenth Amendment in adopting an ordinance "which approves a method of sale of Municipal owned land, which will enable the purchaser to claim as an exemption the payment of City and County taxes as to 40 acres of the land being sold * * * in that it will permit a private corporation to be exempt from its just share of City and County taxation to the detriment of the remaining taxpayers of the Municipality," arises from the provision that the Ball Club will construct recreational facilities costing not to exceed $500,000 on a 40-acre portion of the property to be conveyed by the City and pay to the City $60,000 per year for maintenance thereof for a period of 20 years during which title is to be retained by the City to assure performance by the Ball Club of its policy of providing and maintaining recreational facilities, and in the event such policy and all of the terms of the agreement have been fully and faithfully performed title to such 40 acres shall be conveyed to the Ball Club or Nominee without further consideration. This question of tax exemption is purely a matter of state affair under the rule announced in *Missouri, ex rel. Hill v. Dockery*, 191 U. S. 165, 171.

II.

The Federal Questions Sought to Be Reviewed Were Not Timely or Properly Raised, or Expressly Passed on by the California Supreme Court.

The City's Petition for Writ of Prohibition was filed in the court below on August 7, 1958. In accordance with California procedure (Rule 56(b) of Rules on Original Proceedings in Reviewing Courts, 50 Cal. 2d 43), appellant opposed the petition by filing points and authorities in opposition on August 25, 1958. No mention of the Constitution or laws of the United States was made in that document. Thereafter, the Supreme Court of California issued an alternative writ of prohibition. (See Cal. Code Civ. Proc., Sec. 1104.) Under state practice, appellant then had an opportunity to plead to the City's petition by making a return to the alternative writ in the form of a demurrer, a verified answer, or both. (Cal. Code Civ. Proc., Secs. 1105, 1089; Rule 56(c) of Rules on Original Proceedings in Reviewing Courts, 50 Cal. 2d 43.) Appellant, however, made no return. Thus, when this case was heard by the court below on November 6, 1959, no federal issue was posed by the pleadings.

It is true that, during the course of his oral argument in the California Supreme Court, appellant alluded to an alleged denial of "due process of law." [See p. 44 of appendix to jurisdictional statement.] But that allusion did not present a federal question for decision below, even disregarding the fact that no due process issue was pleaded. The California Constitution also has a due process clause (Art. I, Sec. 13), and appellant's argument is therefore deemed to have referred to that provision instead of to the due process clause of the Fourteenth Amendment to the Federal Constitution. (*Bond v. Scott*, 233 U. S. 658, 665.)

It is also true that appellant did file a further paper in this case prior to the decision of the court below, and that in an appendix to that document he referred to Article I, section 10 of the United States Constitution. (Brief of Respondent Louis Kirshbaum in Opposition to Application for Prohibition, pp. F-25 through F-27; see also p. B-17.) That document resulted from the fact that, at the hearing in the California Supreme Court, appellant's counsel argued that numerous questions of fact were involved in determining the validity of the proposed contract authorized by the ordinance. In view of that assertion, the court granted appellant leave to file a brief. [Tr. of Oral Argument, p. 41.] Appellant thereupon filed the aforementioned brief in which he not only attempted to demonstrate the existence of questions of fact, but also voluminously further argued, both in the body of the brief and through numerous appendices, that the contract and ordinance would be invalid.

The argument in an appendix to that document that the contract is invalid under Article I, section 10 of the Federal Constitution can hardly qualify as a timely and properly raised federal question. The situation is similar to that involved in *Zadig v. Baldwin*, 166 U. S. 485, 488, where, in dismissing a writ of error to the Supreme Court of California, it was stated:

> "The contention that there was a Federal question raised below finds its only support in the fact that there has been printed in the record, as filed in this court, what purports to be an extract from the closing brief of counsel presented to the supreme court of the state, in which such a Federal question is discussed, and it is asserted orally at bar that in the oral argument made in the supreme court

of California a claim under the Federal Constitution was presented. But, manifestly, the matters referred to form no part of the record and are not adequate to create a Federal question when no such question was necessarily decided below, and the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the state."

III.

The Judgment Rests on an Adequate Nonfederal Basis.

In view of the circumstance that the Supreme Court of California did not expressly pass upon any Federal issue, and in view of the condition of the pleadings in this case, it is submitted that the judgment below rests completely upon state grounds. As stated in *Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 54:

". . . jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. . . ."

And see:

Cook County v. Calumet & Chicago Canal Co., 138 U. S. 635, 651.

Conclusion.

For the reasons stated it is respectfully submitted that the appeal of Louis Kirshbaum in this cause should be dismissed.

Viewed dispassionately the contract authorized by Ordinance No. 110,204 is highly beneficial to the public and disposition of the protracted litigation over this ordinance at the earliest possible date is equally in the public interest. As appears from the affidavit of the City Administrative Officer of The City of Los Angeles attached to the petition for writ of prohibition filed in the California Supreme Court as Exhibit E, the contemplated improvement will create an annual tax revenue of $369,920 to be distributed to the various taxing agencies involved, as compared to a present tax revenue of $733.18. It is thus seen from a standpoint of tax revenue alone the public is losing over $1,000 for each day of delay of completion. It is respectfully urged that consideration of this motion to dismiss be considered as early as is compatible with the case load of this Honorable Court.

Respectfully submitted.

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BOURKE JONES,
Assistant City Attorney.

WELDON L. WEBER,
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Attorneys for Appellees.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 155

LOUIS KIRSHBAUM,

Appellant,

vs.

THE CITY OF LOS ANGELES, including members of City Council, City Clerk, and Mayor,

LOS ANGELES DODGERS,

Appellees.

On Appeal From the Supreme Court of the State of California.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

Appellees move to dismiss the appeal upon the ground that the federal questions sought to be raised by appellant are unsubstantial.

The motion is without merit. The federal questions were decided in a manner in conflict with the decisions of this Court.

I.

The Question Whether the Supreme Court of California Interfered Unconstitutionally With the Jurisdiction Granted to the Superior Court and Was Due Process of Law Thereby Denied to Appellant Under the Fourteenth Amendment of the United States Constitution Is a Substantial Federal Question.

In the jurisdictional statement appellant emphasized that he has raised a question of judicial interference by the issuance of the writ of prohibition which strikes at the very essence of due process of law.

Appellee's reply that this is a claim that the California Supreme Court misinterpreted its power under the State Constitution to issue writs of prohibition. Appellee argues that there is nothing in the clauses of the Fourteenth Amendment guaranteeing due process which converts an issue respecting the jurisdiction of a state court into anything other than a question of state law. Such a decision, appellee claims, is binding on this court.

In *Bandini v. Superior Court, Los Angeles County*, 284 U. S. 8, just as in this case prohibition was sought to restrain the Superior Court from enforcing a preliminary injunction. Conversely to the legal situation here, there the petitioner attacked the jurisdiction of the Superior Court upon the ground of the *invalidity* of an oil conservation statute. (In the present case the jurisdiction of the Superior Court was attacked on the ground the ordinance was valid on its face.)

In holding that this court has jurisdiction this court acknowledged that under California law the writ of prohibition is not available as a substitute for appeal from

a court having jurisdiction, also that if the Superior Court of the County has jurisdiction to entertain the action it has the power to define the right to be protected. This court said:

> "If the judgment of the Superior Court be incorrect, it may be reversed on appeal but not on prohibition."

This court added:

> "It follows that in considering and deciding federal questions in the prohibition proceeding, the District Court of Appeal must be regarded, as its opinion imports, as having determined merely that the statute was valid upon its face so that the Superior Court had jurisdiction to entertain the injunction suit. It is that determination alone we can now consider."

This court has on numerous occasions reviewed the decision of a state court where in violation of state constitutional limitations the state court itself has denied due process of law:

> *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 456, 457, 458 ("Novelty in procedural requirements cannot be permitted to thwart review in this court applied for by those who in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights");
>
> *Hovey v. Elliott*, 167 U. S. 409, 417, 419 (holding that due process was denied a defendant whose answer was struck leading to a decree without a hearing on the merits);

Postal Telegraph v. Newport, 247 U. S. 464, 475 (holding that an erroneous decision by the State Supreme Court on the doctrine of *res judicata* was not binding on the United States Supreme Court where the application was inconsistent with due process of law);

Cole v. Arkansas, 333 U. S. 196, 201 (where provision is made by State Constitution for an appeal to a State Supreme Court and on that appeal the court considers questions raised under the Federal Constitution, the proceedings in that court are a part of the process of the law to which appellant was protected under the Fourteenth Amendment);

Fayerweather v. Ritch, 195 U. S. 276 (a judgment of a state court can be reviewed by this court on error on the ground that although the forms of law were observed, it necessarily operated to wrongfully deprive a party of due process of law);

Brinkerhoff v. Hill, 281 U. S. 673, 682 ("While it is for the state courts to determine the adjective as well as the substantive law of the state, they must in so doing accord the parties due process of law");

Georgia v. Decatur, 295 U. S. 165, 171 ("The refusal of a court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process clause of the Constitution");

Shelley v. Kraemer, 334 U. S. 1 ("The action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment");

Brinkerhoff v. Hill, 281 U. S. 673, 680 ("The Federal guaranty of due process extends to state action through its judicial as well as its legislative, executive or administrative branch of government").

In *Tracy v. Ginzburg*, 205 U. S. 170, the Supreme Court announced the exception under which decisions of a State Supreme Court may be reviewed when concerned with the construction of a state constitution or statute. The court said:

> "Within the meaning of that Amendment, a deprivation of property without due process of law occurs when it results from the arbitrary exercise of power, inconsistent with 'those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.' . . ."

In *Myles Salt v. Iberia*, 239 U. S. 478, the Supreme Court said:

> "It is true the law of the state as written is not attacked, but the law as administered and justified by the Supreme Court of the State is attacked, and

it is asserted to be a violation of the Constitution of the United States. The question presented is Federal and a motion to dismiss is denied."

In *Scott v. Neal*, 154 U. S. 34, 46, the Supreme Court said:

"The words 'due process of law' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this Court, 'means a course of legal proceedings according to these rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its constitution—that is by the law of its creation—to pass upon the subject matter of the suit.

* * * * * * * *

"(In the *Ahn* case the defendant's sole reliance was upon a deed from an administrator, acting under the orders of a court which had no jurisdiction to appoint him, or to confer any authority upon him as against the plaintiff.) (Plaintiff by writ of error assigned for error that the probate proceedings were without jurisdiction over the subject matter and absolutely void, that the judgment of the superior court and the supreme court of the state affirming that judgment deprived him of his property without due process of law and were contrary to the 14th Amendment of the Constitution of the United States.)

* * * * * * * *

"The question whether the process thus sanctioned by the court of last resort of the State constitutes

due process of law within the meaning of the 14th Amendment being properly presented to this court for decision, it must exercise an independent judgment upon it."

In Granting the Writ of Prohibition the California Supreme Court Acted Arbitrarily and in Violation of the Fourteenth Amendment.

The traditional use of the writ of prohibition both at common law and in the Federal courts has been, in appropriate cases, to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so. (*United States Alkali Assn. v. United States*, 325 U. S. 201, 203.)

The writs may not be used as a substitute for an authorized appeal. (325 U. S. 201, *supra.*)

The California Supreme Court has held that even the *Legislature* could not constitutionally extend the office of the writ of prohibition beyond its scope at common law. The court in *Camron v. Kenfield*, 57 Cal. 551, upheld the contention that it was not competent for the Legislature by extending the office of the writ to enlarge the jurisdiction of the Supreme Court.

In *Maurer v. Mitchell*, 53 Cal. 289, 291, the California Supreme Court concluded that the writ of prohibition referred to in the California Constitution was the same writ known to the common law.

The Supreme Court in interpreting the scope of the writ then said:

> "Nor does the language of sec. 1102 of the Code of Civil Procedure require of us to hold that the office of the writ has been extended, or that it should not issue in cases in which it could not have been

resorted to prior to the statute. The full text of that section is as follows: 'The writ of prohibition is the counterpart of the writ of mandamus. It arrests the proceedings of any tribunal, corporation, board, or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.'

". . . The word 'jurisdiction,' when used in connection with 'prohibition,' would be at once understood as being employed in the sense of the legal power or authority 'to hear and determine causes.'

". . . In prohibition it must be shown to the Court that the inferior Court or person *has* exceeded the powers conferred by law, and the Court interferes to prevent further proceedings without or in excess of such power." (Emphasis by the Court.)

In *Coker v. Superior Court*, 58 Cal. 177 (1881), the California Supreme Court interpreted the function of the writ of prohibition as follows:

"A writ of prohibition is a preventive, not a remedial process. It can not be used to take the place of an appeal, or writ of certiorari, or other mode of review. Whenever any of these remedies is available prohibition can not be resorted to."

"It is only in cases where the inferior tribunal is about to do some act unauthorized by law that the writ will lie." (*Heeren v. Reed*, 126 Cal. 219, 222.)

In *Johnston v. Superior Court*, 4 Cal. App. 90 (1906), the limitations upon the part of a reviewing court to issue prohibition was held to exclude cases amounting to no more than "a mere error reviewable and correctible

through the ordinary remedy of appeal." The court also said that prohibition could not be invoked for the purpose of "obviating the effect of rulings made by a court engaged in issues over which it has undoubted jurisdiction."

The court added:

> "To tolerate such a practice would be subversive of the purpose of the writ which is to restrain inferior tribunals and bodies from inflicting wrong under the guise of jurisdiction or authority which has no potential existence. It would invite intolerable delay and annoyance in every case where a jurisdictional question might perchance be incidentally involved, and make this prerogative writ the medium through which appellate courts could exercise supervisory control over inferior tribunals acting within the scope of their legitimate powers."

In *Cooke v. Superior Court*, 73 Cal. App. 744 (1925), prohibition was sought to prohibit the superior court from further hearing a proceeding in habeas corpus involving custody of a child. In denying the writ the appellate court said:

> ". . . It follows that prohibition does not lie to prevent that tribunal from exercising, in that respect, its lawful jurisdiction. . . . Prohibition is not available to restrain a subordinate court from deciding erroneously."

In *Cullinan v. Superior Court*, 24 Cal. App. 2d 468, 478, the Appellate Court, in denying a writ of prohibition, said:

> "Mere errors or irregularity of procedure may not be corrected by means of the writ of prohibition. It is said in 50 Corpus Juris, page 676, Section 43:

"'Prohibition does not lie to correct or restrict errors or irregularities of a tribunal which is acting within its jurisdiction, although proceeding improperly in the exercise of that jurisdiction. The remedy cannot be used to supersede the ordinary functions of an appeal or writ of error, except as it may be permitted by statute. Where the inferior court or tribunal has jurisdiction of the person and the subject matter, prohibition does not lie to prevent an erroneous decision, or to prevent the enforcement of an erroneous judgment. Where the existence of jurisdiction depends on controverted facts which the inferior court or tribunal is competent to determine, prohibition does not lie, even though the lower tribunal may in such case err in its determination of the question.'"

In the case of *Wreden v. Superior Court*, 55 Cal. 504, it is said:

"'The mere fact, if such were the fact, that a court is about to act erroneously or irregularly in a matter of which it has jurisdiction, will not warrant the issuance of a writ of prohibition. Such a writ cannot be used to prescribe what a court shall or shall not consider in a matter before it and within its jurisdiction, any more than a writ of mandate can be used to compel a court how or what to decide. To do either would be to interfere with the judicial functions of a court.'"

In *Colma v. Superior Court*, 75 Cal. App. 91 (1925), an application for a writ of prohibition to prevent the superior court from ordering the substitution of a personal for a surety bond was denied. The appellate court stating:

"(1) By virtue of section 1057 of said Code of Civil Procedure the superior court is expressly vested

with jurisdiction to entertain and to grant a motion for substitution of a new bond upon certain grounds. Its authority therefore to decide such a motion correctly or incorrectly is beyond question. Assuming then, as petitioner contends, that said court intends to and will decide such motion erroneously, it follows that its action in that respect would amount to no more than error committed in the exercise of its jurisdiction (*Department of Public Works v. Superior Court*, 197 Cal. 215), and it is well settled that a writ of prohibition is not available to restrain the commission of error."

In the petition for a rehearing filed with the Supreme Court of California appellant Kirshbaum argued:

"To extend the application of prohibition to the present case will invade and divest a court of general jurisdiction from its constitutionally granted powers to hear a cause on its merits and within the jurisdiction granted to it. It will deny to a superior court the right to grant a temporary injunction until it will have determined the validity of legal issues on both law and fact which was within its exclusive province. It will deny to the plaintiff in the case below the due process of the law of a full and fair hearing on the merits, and of the right to a decision by a court vested with the power to determine the questions of fact and law involved.

"It will permit an indirect attack on the findings and judgment of a trial court in a case involving one or more disputed questions of fact.

"It will permit a judgment in a separate action to be indirectly attacked by prohibition in a subsequent

separate proceeding altho the right of appeal exists and is being taken.

"It will prejudice the right of the plaintiff in case 699077 to avail himself of the presumptions and the inferences available on appeal.

"The peremptory writ issued in this case unless vacated will divest the superior court of its constitutionally granted power to hear and determine issues of law properly within its jurisdiction, and to maintain the status quo pending a decision on the merits. By so doing the due process of law guaranteed to all persons under the United States Constitution will have been impaired."

Due process of law was denied appellant by the action of the Supreme Court of California in violation of the United States Constitution by granting prohibition directed against a case within the lawful jurisdiction of the Superior Court. The Superior Court possessed original equity jurisdiction to determine the validity of the referendum election. (Cal. State Const., Art. VI, Sec. 5.)

The California Supreme Court has heretofore construed this power to include jurisdiction by superior courts to determine the validity of elections. (*Rideout v. City of Los Angeles*, 185 Cal. 426; *Davis v. County of Los Angeles*, 12 Cal. 2d 412, 426; *Communist Party v. Peek*, 20 Cal. 2d 536, 556.)

The writ of prohibition prevented appellant from proceeding to a trial on the merits before the Superior Court. It thereby prevented the introduction into evidence in the referendum case of the legal objections appellant had against the validity of the ordinance.

Although the California Supreme Court announced that it would consider the evidence presented in the former

case, actually appellant was prevented from introducing *in the referendum case* additional evidence to substantiate the claimed invalidity of the proposed contract and ordinance.

As stated in the case of *Georgia v. Decatur*, 295 U. S. 165, 171, *supra*, a refusal of a court to receive or consider any proof on a subject amounts to a denial of a hearing on that issue in contravention of the due process clause of the Constitution.

Similarly a court violates due process of law if it grants prohibition in a case involving a disputed question of fact. (*Brock v. Superior Court*, 11 Cal. 2d 682; *Agricultural v. Superior Court*, 5 Cal. 2d 550; *French v. Cleaners*, 91 Cal. App. 2d 890, 898, 899; *American v. McCune*, 67 Cal. App. 2d 583.)

After acknowledging appellant's contention that the Supreme Court had no power to issue prohibition in a case involving a disputed question of fact, the California Supreme Court determined that neither the first case that had been completed or the pending referendum case presented a "substantial question of fact upon a material issue."

In addition to its disregard of the numerous factual contentions advanced by appellant in his brief in opposition to the issuance of prohibition, and again in the petition for a rehearing (pp. 22-25), the California Supreme Court also ignored the trial court's references to the following issues of fact:

(1) that the City Council had the right to sell the land only if it "*properly determined*" that it was no longer required for the use of the City (J. S. Appx. p. 22);

(2) that the declaration in the ordinance ("whereas the land is no longer required for the use of the city") was not in accordance with the *facts recited* (J. S. Appx. pp. 24-25);

(3) concerning the recital in the ordinance that the City is in the process of acquiring additional property and such property is no longer required for the use of the City, the trial court had said, "... the finding of the legislative body is not conclusive and that the court *may examine the facts* to determine whether there has been an abuse of discretion or an illegal expenditure of public funds or that the action is ultra vires" (J. S. Appx. p. 28);

(4) whether the land the City proposes to buy and immediately convey to the Ball Club *was being acquired for a public purpose* (J. S. Appx. pp. 29-34);

(5) the factual interpretation to be given the words "proper condition" (J. S. Appx. pp. 36-37).

These issues are questions of fact and were in issue in the referendum case.

The decision of the California Supreme Court unconstitutionally enlarging its own jurisdiction, and in thereafter unlawfully interfering with the jurisdiction granted by state constitution to a Superior Court, has denied to appellant the due process of law protected by the Fourteenth Amendment of the United States Constitution.

The Federal Question Is Substantial

Appellee argues that a disagreement with the State Supreme Court's appraisal of the record before it does not present a federal question of substance.

Where a federal right has been denied, this Court may re-examine a finding of fact or a unified finding of fact and law made by a state court. (*Great Northern v. Washington*, 300 U. S. 154, 165; 166, 167; *Carlson v. Curtiss*, 234 U. S. 103, 106; *Postal Telegraph v. Newport*, 247 U. S. 464, 473; *Merchants v. Richmond*, 256 U. S. 635, 683.)

II.

The Federal Question Was Properly Presented to and Passed Upon by the State Court so as to Support the Jurisdiction of This Court to Review the Judgment of the State Court.

In *Grannis v. Ordean*, 234 U. S. 385, 394, a motion to dismiss an appeal to the United States Supreme Court on the ground that the Federal question was not properly raised in the state court. In denying the motion, the Supreme Court said:

> "This motion must be denied. It is true that until the decision of the supreme court of the state, the Federal right was not clearly asserted. But it was not infringed in the trial court, which held in favor of the contention of defendant (now plaintiff in error) that the decree in the partition suit was not valid because of the insufficiency of the notice to Geilfuss. It was the decision of the supreme court, upholding the notice, that first ran counter to the alleged Federal right. In a petition for reargument, filed by the now plaintiff in error, it was suggested that the necessary effect of the decision was to deprive him of his property without due process of law, contrary to the 14th Amendment. The supreme court entertained the petition, considered and over-

ruled the contention that petitioner's righs under the Amendment were infringed, declared that its decision was to be interpreted as holding against the contention, and therefore refused a reargument. This is sufficient to confer jurisdiction upon this court."

In *Saunders v. Shaw*, 242 U. S. 1165, this Court said:

"The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of error filed the day before the chief justice of the state granted this writ. Of course, ordinarily that would not be enough. But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. *Home Teleph. & Teleg. Co. v. Los Angeles*, 227 U. S. 278. It appears that shortly after the supreme court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done."

In *Truax v. Corrigan*, 257 U. S. 312, 329, the Supreme Court said:

> "In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

III.

Reply to Appellee's Contention B.

(Questions 4 and 6 concerning the so-called "Public Purpose" restriction and its contemplated removal.)

Appellee argues that question 6 was not timely raised. (Did the City Council and its Mayor violate Article I, Section 10, of the United States Constitution, in adopting an ordinance which approves the extinguishment of a public purpose deed restriction thus constituting an impairment of contract as against the beneficiaries of the contract, to wit, the citizens of the municipality?)

Appellee argues that appellant did not raise this question in his points and authorities in opposition to the Petition for Prohibition.

The first indication that appellant had that the California Supreme Court intended to adjudicate the validity of the ordinance on its merits in the prohibition proceed-

ing was at the oral argument before the Supreme Court [Clk. Tr. Vol. I, Tr. of oral argument, p. 44].

The Supreme Court then indicated it desired briefs on the question as to the validity of the ordinance.

Appellant at the oral argument requested permission to file with the Supreme Court a copy of his trial brief and the reporter's transcript of all of the evidence introduced in Superior Court Case No. 699077, and the clerk's transcript containing the original petition and points and authorities. This request was granted [Clk. Tr. Vol. I, Tr. of oral argument p. 41]. There was thereafter submitted to the Supreme Court the reporter's transcript. The reporter's transcript contains repeated argument by counsel for appellant of the alleged violation of Article I, Section 10, of the United States Constitution [Rep. Tr. pp. 272-279 Vol. II, Clk. Tr.]. The points and authorities attached to the petition similarly contain the challenge of unconstitutionality as to impairment of contract [P and A, pp. 28-30, attached to petition case 699077, Vol. II, Clk. Tr.]. Appellant's trial brief was attached in the appendix to Appellant's Brief in Opposition to the Application for Prohibition.

The brief corresponded to the instructions of the Supreme Court to point out wherein questions of fact were involved in case 699077.

Appellant was not required to assume that the Supreme Court in violation of established legal procedures would invade the constitutionally granted jurisdiction of a Superior Court by granting prohibition or that the court would disregard the judgment already then lawfully entered by the Superior Court.

Contrary to appellee's argument that appellant filed no answer to the petition for prohibition, appellant filed points

and authorities in opposition to the petition. In those points and authorities appellant pointed out that a judgment had already been rendered declaring the proposed contract to be illegal and void.

Since the Supreme Court did not have the lawful authority to interfere with that judgment in a prohibition proceeding, appellant did not anticipate that the Supreme Court would by an enlargement of its jurisdiction attempt to do indirectly by a collateral attack on a completed judgment that which it could not lawfully do directly.

There was therefore no occasion for appellant in his initial reply to appellee's application for prohibition to set up the unconstitutionality of the ordinance. A court of competent jurisdiction had already done so after a contested trial.

Upon the first indication that the California Supreme Court had ignored the judgment in case number 699077 and had made an adjudication in the prohibition proceedings as to the validity of the ordinance, appellant proceeded to more formally present the federal questions by petition for rehearing.

It was not until the California Supreme Court had in complete disregard of the provisions of the state constitution, and of the established law of the state ousted the Superior Court of its lawful jurisdiction directly in case 703023 and indirectly in case 699077 that appellant was required to present the federal questions.

Under similar circumstances this has been held to be timely. (*Saunders v. Shaw*, 244 U. S. 317; *Missouri v. Gehner*, 281 U. S. 313, 320; *Brinkerhoff v. Hill*, 281 U. S. 673, 677, 678; *Grannis v. Ordean*, 234 U. S. 385, 392; *International Steel v. Surety Co.*, 297 U. S. 657, 665; *Great Northern v. Sunhurst*, 287 U. S. 358, 367.)

Appellee argues that appellant's question four expressly proceeds on the assumption that the deed prohibits the city from conveying such land to a private corporation for private use.

Whether the deed is a contract, what is its proper construction, and was its obligation impaired are questions that this court may answer independently of the conclusion of the state court. (*Appleby v. City of New York*, 271 U. S. 379; *Russel v. Sebastian*, 233 U. S. 197; *Mobile v. Tennessee*, 153 U. S. 486, 493; *Larson v. South Dakota*, 278 U. S. 429, 433; *Coomber v. Getz*, 285 U. S. 434.)

That it was not the intent to permit a resale to a private party is established by the congressional act which permitted the sale at bare land cost if it were purchased by the city with the federal government then absorbing the loss in the differential between the total acquisition cost and the selling price amounting to a sum in excess of four million dollars.

The Independent Offices Appropriation Act of 1954 which authorized this sale also provided that if the lands were not purchased by a public agency in that event the land was to be sold at public auction.

The housing officials insisted that the original escrow agreement which did not contain the public purpose deed restriction be amended to include such a restriction.

The council was informed of this demand and adopted an ordinance approving the purchase subject to the public purpose deed restriction.

The deed was submitted to the public housing authority before being filed in escrow, and the deed restriction was specifically approved.

It would indeed be difficult to find a transaction where a grantor tried more carefully to insure that a deed restriction be provided for in the public interest and the public welfare.

Appellee argues that appellant has also failed to show any justiciable right as to which he is entitled to seek protection under the Constitution of the United States.

Appellee states that a taxpayer has no vested or proprietary interest in public funds in property. The case of *City of Glendale v. Crescenta*, 135 Cal. App. 2d 784 cited by Appellee recognizes that taxpayers may sue to prevent misapplication of city funds or properties. A taxpayer has the right to enjoin the illegal use of municipal funds or property.

Code Civ. Proc., Sec. 562(a);

Buscaglia v. District Court, 145 F. 2d 274;

Franklin v. Tugwell, 85 F. 2d 208;

Crampton v. Zabriskie, 101 U. S. 601 (of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question")

Griffith v. Dept. Public Works, 141 Cal. App. 2d 376;

Mock v. Santa Rosa, 126 Cal. 330;

O'Melveny v. Griffith, 178 Cal. 1;

Schaefer v. Bernstein, 140 Cal. App. 2d 278;

Mines v. De Valle, 201 Cal. 273;

Clark v. Cline, 51 S. E. 620;

Mahoney v. San Francisco, 201 Cal. 273;

Marshal v. Standard, 17 Cal. App. 2d 19;

Trickey v. City of Long Beach, 101 Cal. App. 2d 871.

Conclusion.

For all the foregoing reasons appellant respectfully submits that the motion to dismiss should be denied.

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ILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 155

LOUIS KIRSHBAUM,

Appellant,

vs.

THE CITY OF LOS ANGELES, *et al.*,

Appellees.

On Appeal From the Supreme Court of the State of California.

REPLY TO MOTION OF APPELLEES (CITY OF LOS ANGELES) TO DISMISS.

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Appellees.

On Appeal From the Supreme Court of the State of California.

REPLY TO MOTION OF APPELLEES (CITY OF LOS ANGELES) TO DISMISS.

I.

Reply to Appellees' Argument Point 1.

(The Determination by the California Supreme Court That a Writ of Prohibition Should Issue From That Court to Stay Any Further Proceedings in the Los Angeles Superior Court to Enjoin Declaring the Results of a Referendary Election on a City Ordinance Does Not Present Any Reviewable Question Before the United States Supreme Court.)

The argument made by appellees that appellant's first two questions are all matters of local procedure under the rule announced in *Gasquet v. Lapeyre*, 242 U. S. 367, and

John v. Paullin, 231 U. S. 583, has been fully answered by appellant in his reply to the motion to dismiss filed by the Los Angeles Dodgers.

There is no conflict between these cases and the cases relied upon by appellant.

The decision of a State Court will be reviewed where, in violation of constitutional limitations, the State Court *itself* has denied due process of law:

N. A. A. C. P. v. Alabama, 357 U. S. 449, 456;
Hovey v. Elliot, 167 U. S. 409, 417, 419;
Postal Telegraph v. Newport, 247 U. S. 464, 475;
Cole v. Arkansas, 333 U. S. 196, 201;
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Scott v. Neal, 154 U. S. 34, 36.

II.

Reply to Appellees' Point 1(a).

(The California Supreme Court's Determination of the Absence of Any Disputed Material Questions of Fact Was Made After Careful Investigation and Its Determination Is Conclusive.)

Appellee argues that this Court should not be called upon to review the correctness or incorrectness of the decision made by the California Supreme Court granting prohibition, because the California Supreme Court has said, "none of the persons attacking the contract has

pointed to any evidence which would present a substantial question of fact upon a material issue."

The answer to this argument is found in *Merchants v. Richmond*, 256 U. S. 635, 638 and *Postal v. Newport*, 247 U. S. 464, 473.

In the *Merchants* case *supra*, plaintiff in error drew in question the validity of an ordinance imposing a tax on the ground of its repugnance to a Federal statute. The State Supreme Court had sustained the ordinance. The United States Supreme Court held that a writ of error was the appropriate process for reviewing the final judgment of the State Supreme Court with respect to the contention made that certain evidence had not been passed upon, or findings of fact made thereon. The United States Supreme Court in reversing the judgment of the State Court said:

> "But this omission does not relieve us of the duty of examining the evidence for the purpose of determining what facts reasonably might be, and presumably would be, found therefrom by the State Court, if plaintiff in error's contention upon the question of Federal law should be sustained and the facts thereby shown to be material."

In *Postal v. Newport*, *supra*, in reversing a judgment in favor of a municipality in a suit to recover license taxes, the United States Supreme Court said:

> "But the question arises whether the basis of fact upon which the State Court rested its decision denying the asserted Federal rights *has any support in the record*; for if not it is our duty to review and correct the error." (Emphasis added.)

In *Carlson v. Washington*, 243 U. S. 103 the United States Supreme Court said:

> "While in ordinary cases, we are bound by the findings of the State Court of last resort respecting matters of fact, it is hardly necessary to say that that Court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a Federal right, any more than it could do so by making findings that were wholly without support in the evidence."

The California Supreme Court acting under a miscomprehension of the facts and law deprived appellant of due process of law in granting prohibition on the assumption that none of the persons attacking the contract had pointed to any evidence which would present "a substantial question of fact upon a material issue."

The court in violation of fundamental principles rejected appellant's contention that the following issues were material questions of fact in case 699077 and were equally in issue in the Referendum case:

(1) Whether the land was no longer required for the use of the city;

(2) Whether the Council had made any investigation to determine if the land was no longer required for the use of the city as required by the charter and rules of the council;

(3) Whether the Council had obtained the approval of the city department under whose control the land was held as provided by Section 393 of the Charter;

(4) Whether it was the intent of the parties to exempt the ball club from the payment of real property taxes for 20 years;

(5) Whether it was the intent of the parties in granting the ball club control over the expenditure of two million dollars of municipal funds to enable the ball club to pave its parking lot at public expense;

(The City Council has now, without waiting for this Court to act, awarded a contract to grade that portion of the land upon which the stadium will be built to be paid for with public funds for the personal benefit of the ball club in the sum of $646,890.00);

(6) Whether the City was proceeding to acquire with public funds land from private owners for the purpose of conveying the land to be acquired to the ball club and to do so without any additional consideration therefor;

(7) Whether the land to be acquired was being acquired for a public purpose;

(8) Whether it was necessary for the city to acquire the additional land;

(9) Whether the proffered evidence in case 699077 rejected by the trial court would be admissible in the referendum case;

The trial court's decision similarly shows that these questions of fact were considered by the trial judge:

1. That the City Council had the right to sell the land only if it *"properly determined"* that the land was no longer required for the use of the City (J. S. Appx. B, p. 22);

2. That the declaration in the ordinance ("whereas the land is no longer required for the use of the city") was not in accordance with the *facts recited* (J. S. Appx. B, pp. 24-25);

> ". . . the finding of the legislative body is not conclusive and that the court *may examine the facts*

to determine whether there has been an abuse of discretion or an illegal expenditure of public funds or that the action is ultra vires". (emphasis added) (J. S. Appx. B, p. 28);

3. Whether the land the City proposes to buy and immediately convey to the Ball Club *was being acquired for a public purpose* (J. S. Appx. B, pp. 29-34);

4. The factual interpretation to be given the words "proper condition" (J. S. Appx. B, pp. 36-37).

All of the foregoing issues are questions of fact and were in issue in the referendum case.

Concerning the recital in the ordinance that the City is in the process of acquiring additional property and such property is no longer required for the use of the City, the trial court declared:

Thus, although the trial judge inadvertently sustained an objection to the introduction of the rules of the Council, the trial court later in its decision recognized and declared that the Council could only sell the land if it "*properly determined*" that the land was no longer required for the use of the City.

The Charter, which is the Constitution of the City imposes a limitation upon the sale of municipal owned land, to-wit: "any real property owned by the City of Los Angeles *that is no longer required for the use of the City*, may subject to the limitations elsewhere prescribed in this charter be sold . . ." (Emphasis added.) (Sec. 393 Charter of Los Angeles.)

Even if it be assumed that this provision could be held applicable to land acquired in trust, appellant raised as an issue in the case, which he pursued at every stage of the

proceedings, that the declaration in the ordinance reciting that the land was no longer required for the use of the City was a false recital.

Appellant asked for a jury trial on this issue, and a pre-trial order was made (which in California has the force of a judgment), reciting:

> "Counsel for the plaintiff LOUIS KIRSHBAUM demands a trial by jury and states that the issues of fact to be tried by the jury are whether at the time of the adoption of the ordinance in question the declaration in the ordinance that the land is no longer required for use of the City is a false recital."

Trial by jury was later waived but this issue was submitted to the trial court who expressly found that the declaration in the ordinance was a false recital.

There was an additional question of fact which went to the jurisdiction of the Council to act, and of which the State Courts were required to take judicial notice.

The Charter of the City of Los Angeles provides for a committee form of government. (Sec. 34, Los Angeles Charter.) The Rules of the Council require all matters filed with the City Clerk to be referred to the appropriate committee. [Rules of the Council number 48, 50 and 52. Ex. Clk. Tr. case 155, Vol. III.] Upon objection of appellees the trial court refused to permit the rules to be received into evidence. [Rep. Tr. case 699077, pp. 207, 208, 209.]

In concluding that none of the persons attacking the contract had pointed to any evidence which would present a substantial question of fact upon a material issue the California Supreme Court overlooked that the minutes

of the Council introduced into evidence disclosed that the Council had failed to make any investigation to properly determine whether the land was required for the use of the City.

Section 48, 50 and 52 of the rules of the Council expressly provide for the procedure to be followed by the Council in matters presented to the Council:

"48. With the exception of matters required by law to be first presented to the Council, the President shall refer to the appropriate committees or departments all matters filed with the City Clerk or presented directly to the Council. A memo of such references shall be furnished to each Councilman.

"50. A committee (special or standing) appointed to report on any subject shall report the facts in relation to the matter or subject referred, with its findings thereon in writing; and no report shall be received as the report of a committee except the same shall be signed by a majority of the committee. Nothing herein contained shall prevent a minority from submitting its report at the time the majority report is submitted.

"52. All committees shall report to the Council their findings on matters referred to them. After two weeks from the time any matter is referred to a committee or committees such matter may upon motion be withdrawn from such committee or committees and presented to the Council for its consideration or action."

These rules when read together with Section 34 of the Charter, imposed on the Council a mandatory jurisdictional condition precedent before it could lawfully sell municipal owned land.

Whether these provisions of the charter and rules had been complied with was a *question of fact* upon which the jurisdiction of the Council to act depended and was an issue in the case.

The Court was required to take judicial notice of the Charter which in California has the force of a statute. It was similarly required to take judicial notice of the rules of the Council adopted pursuant to the Charter.

Code Civ. Proc., Sec. 1875;

Varcoe v. Lee, 180 Cal. 338 "An appellate court can properly take judicial notice of any matter of which the court of original jurisdiction may properly take notice. Pennington v. Gibson, 16 How. 65").

Rules created pursuant to the charter have the same force as the charter provisions.

Perez v. Board of Police Commissioners, 78 Cal. App. 2d 638;

Campbell v. City of Los Angeles, 47 Cal. App. 2d 310;

Montenegro v. Board of Education, 145 S. W. 740;

Hicks v. Long Beach, 55 Atl. 250;

Erie v. Mayor, 76 Atl. 1065 (N. J.);

Baker v. Combs, 239 S. W. 56 (Ky.).

An ordinance passed in violation of such rules is nugatory.

Swindell v. State, 42 N. E. 528 (Ind.).

What the law requires to be done for the protection of the taxpayers is mandatory.

Clark v. Crane, 5 Mich. 151.

The referral to a Committee of the Council to determine whether the land was no longer required for the use of the City was a condition precedent to the power of the Council to act. The Council was without power to act on the proposed contract until a *committee of the Council* had completed and submitted to the Council a Committee Report concerning its findings and recommendations as to whether they had found that the *land was no longer required for the use of the City.*

Section 34 of the Charter of the City of Los Angeles provides that all the functions of government shall be divided into divisions equal to the number of the members of the Council—that it *shall* be the duty of each such committee to be fully informed of the business of the City included within the division to which it is assigned, and to report to the City Council such information and recommendations.

The following cases hold that reference to a committee, when so required by Charter, is a condition precedent to the exercise of its power to act:

In *Schofield v. City of Los Angeles*, 120 Cal. App. 2d 240, it was held that the provisions of the Charter of Los Angeles, which provided that no zoning ordinance shall be adopted unless first submitted to the City Planning Commission for a report and recommendations, are not merely directory but constitute conditions precedent and that without compliance with them such an ordinance cannot be legally passed.

In *Worthington v. City of Covington*, 82 Ky. 265, the Charter provided that "before any contract shall be made by the Council . . . the proceedings of the Council with reference thereto shall be referred to the Committee on

Law." This was not done. Commenting on the failure to make this referral to the committee, the Appellate Court said:

> "The manifest object (of these provisions in the Charter) was to prevent improvident legislation by the Council; to create a circumspect body that would stand between the street contractor and the City Treasurer; between the lot owner and the tax collector; between the citizen and the almost absolute power of the City Council, and see that no wrong was committed. The Council not having taken the steps which gave it a right to contract or to create a lien upon the lots of the appellant for the cost of the improvement in question, which action was a *condition precedent* to the exercise of its power to do so or to make the assessment, the judgment below is reversed."

In *Gilman v. City of Milwaukee*, 61 Wisc. 588, the Charter provided that all resolutions of the Council creating any charge against the City shall be referred to appropriate committees and shall be acted on by the Council only at a subsequent meeting not held on the same day.

On appeal, the Superior Court of Wisconsin said:

> "This section is expressly prohibitory. In direct violation the matter embraced in the resolution was never referred to any Committee by the common Council and was acted upon by them not only on the same day on which it was first presented but also at the same meeting of the Council . . . . *Such requirements were preliminary to such action upon the merits and to our minds was jurisdictional.*

Being jurisdictional and such preliminary never having been had, the Council was without power to pass the resolution."

In this case, the evidence is uncontroverted that there was no reference to a committee and no report in writing to the Council concerning the issue as to *whether the land was no longer required for the use of the City.* It follows that the City Council had no power to approve the proposed contract until such a report had been submitted to them by the appropriate Committee concerning this issue.

In the case of *Cimpher v. Oakland*, 162 Cal. 87, the California Supreme Court said:

> "If it be conceded that the city had power to grant or sell the tidelands for what appears to have been a private use or to dispose of them at all except in aid of the public rights of navigation and fishery, it could do so only in the manner prescribed by its Charter."

The law in California repeated in case after case is as stated in the case of *Keller v. Oakland*, 54 Cal. App. 169, 172:

> *"When power is delegated to municipal bodies, and the mode for the exercise of that power is prescribed the mode must be followed. As has been repeatedly held the mode in such cases constitutes the measure of the power."* (Emphasis added.)

The *California* decisions have established and sustained the fundamental doctrine that Charters being the creatures of the Legislature and the instruments for exercising

powers delegated to municipalities the *mode therein prescribed must be followed exactly.*

Zottman v. San Francisco, 20 Cal. 96 (regarded as a leading case);

Macoy v. Bryant, 53 Cal. 247;

Osborne v. Stone, 170 Cal. 480 ("Where the mode is thus prescribed any radical departure from it results in a void contract");

Reams v. Cooley, 171 Cal. 150, 154.

The California Courts have consistently held that municipal contracts entered into without compliance with the Charter are void:

In re City and County of San Francisco, 195 Cal. 426, 434, 444;

Times Publishing Co. v. Weatherly, 139 Cal. 618;

Gamewell v. Los Angeles, 45 Cal. App. 149, 154.

Contrary to appellee's contention that the California Supreme Court's determination of the absence of any disputed material questions of fact should be held by this Court to be conclusive the undisputed evidence establishes that the determination and action of the Supreme Court has no support in the record, is contrary to the applicable law and has violated a federal right. Due process of law was violated in the denial of the right to be heard in the referendum case, the right to offer evidence and to a judgment on the merits.

The California Supreme Court acted under a clear mistake of law:

1. In disregarding that the undisputed evidence (the minutes) showed that the Council had violated the mandatory requirement of the charter and rules of the Council;

2. In making a determination that the declaration in the ordinance was conclusive on the courts;

3. In concluding that there were no material questions of fact;

4. In granting prohibition against a court of competent jurisdiction under the following circumstances:

(a) Without passing on the constitutional question as to whether a Superior Court may hear a case involving the validity of a referendum election;

(b) Without passing on the jurisdictional question as to whether a referendum election may take place involving the administrative act of selling municipal owned land; or of selling land held in trust.

(c) Without passing on the constitutional right of the appellant to introduce additional evidence in the Referendum case.

5. In depriving a court of its constitutional granted power to determine on the merits: questions of law and fact in a case within its jurisdiction.

6. Employing the writ of prohibition for the purpose of indirectly attacking a completed judgment in a separate case from which an appeal was being taken.

The error made by the California Supreme Court in determining that there was no substantial questions of fact raised upon a material issue is traceable to the court's conclusion that evidence proffered to show that the Council had taken no steps to determine whether the land was no longer required for the use of the City was inadmissible. The California Supreme Court concluded that the "proffered evidence if admitted would be insufficient to overcome the declaration in the ordinance that the land to be conveyed by the City was no longer

required by the City, since the offer does not show any fraud or abuse of discretion by the Council."

This interpretation made by the California Supreme Court that the evidence offered by appellant to show that the City Council had not complied with the mandate of its Charter was not sufficient to overcome the declaration in the ordinance that the land was no longer required for the use of the City, since the offer did not show that any fraud or abuse of discretion, misjudged the purpose of the offer of the proof and contrary to established law.

In *Phelps v. Witt*, 201 S. W. 2d 671, the Court there said:

> "One of the *tests* of whether or not an official, or a set of officials, has abused discretion lies in a determination of whether or not the pertinent law has been closely followed. See vol. 12, Words and Phrases, Perm. Ed. page 588. (If appellees did not submit their proposed plans, site, and community selection to the state superintendent for his approval, or, at least, for his advice, we do not see how it can be logically contended that they have closely followed the law or more specifically the regulations provided under the law and set up for the particular benefit of all of our public school systems of this commonwealth.)"

Due process of law is denied by an interpretation that the legislative finding of a city council is not subject to judicial inquiry.

United States v. Carolene, 304 U. S. 142, 150, 152, 153;

Chicago v. Minnesota, 134 U. S. 418, 456, 457;

Cincinnati v. Vester, 281 U. S. 439, 447.

In *Block v. Hirsh*, 256 U. S. 135, the United States Supreme Court said,

> "no doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law for instance, that a certain use is a public one may *not* be held conclusive by the courts." (Emphasis added.)

The *California* Courts have similarly held that a declaration or resolution made by a Council or Board of Supervisors is not conclusive on the courts:

People v. Los Angeles, 62 Cal. App. 781;
San Christina v. San Francisco, 167 Cal. 762, 769, 770, 772;
Coulter v. Pool, 187 Cal. 181, 185, 186;
In re Newell, 188 Cal. 762;
Logan v. Shields, 190 Cal. 664.

Thus it follows as stated within the case of *Postal v. Newport*, 247 U. S. 464, "the question arises whether the basis of fact upon which the state court rested its decision denying the asserted federal rights has any support in the record, for if not it is our duty to review and correct the error."

Additionally since appellant's case is based upon an alleged impairment of contract it is for the United States Supreme Court to determine whether the deed is a valid contract, what was its proper construction and was its obligation impaired by subsequent legislation as enforced by the State Court.

"These questions" the court said in *Appleby v. New York*, 271 U. S. 364, 379, "we must answer independently

of the conclusion of the state court. * * *" It makes no difference that the answer to them involves general or purely local law, we cannot surrender the duty to execute our own judgment.

II.

Reply to Appellees' Point 2.

(The Determination That Public Funds May Lawfully Be Expended by the City of Los Angeles Involves Only the Construction of a City Ordinance and the Power and Authority of the City of Los Angeles Under the Constitution and Laws of the State of California.)

Appellee argues that appellant's question number 3 raises a question solely of construction of the ordinance and that this is not a matter to be reviewed in the United States Supreme Court.

Appellant's question number 3 is as to whether the City Council and the Mayor violated due process of law under the 14th Amendment of the United States Constitution in approving the ordinance for the expenditure of tax funds for the purpose of acquiring and conveying land to a private corporation, engaged in a private enterprise for its private profit.

Appellant will make no reply at this time to the cases cited by appellee for the reason that appellant has not endeavored to brief this point in his statement of jurisdiction. This point is being answered in the *Julius Ruben*, case, No. 291.

III.

Reply to Appellees' Point 3.

(Whether the City of Los Angeles May Sell to a Private Corporation Land Acquired From the Housing Authority of the City of Los Angeles (a State Agency) by Deed Containing Language Relative to Use for Public Purposes Only and Use Its Best Efforts to Have This Deed Restriction Removed Involve Matters Relating to Construction of the Deed and Power and Authority of the City Under State Law Which Are the Subject of Review by the United States Supreme Court nor Is Any Contract Right of Any Member of the Public Involved.)

Appellee argues that appellant's question No. 4, which is stated in the above heading, is a misinterpretation of the ordinance. Appellee declares that the ordinance merely provides that the City agrees to use its best efforts to have such deed restriction eliminated or modified so as to permit use contemplated by the Ball Club.

Appellee overlooks that Section 1 of said ordinance obligates the City to convey the land. Section 1 of said ordinance reads as follows:

> "1. City will convey the property presently owned by it in Chavez Ravine consisting of 185 acres, more or less, . . ."

Appellee then argues that both appellant's questions 4 and 6 involve merely an interpretation of the deed provision and the power of the City to act in the premises. Question 6 is as follows:

> "Did the City Council and the Mayor violate Article 1, section 10 of the U. S. Constitution in adopting an ordinance which approves the extinguishment of a

public purpose Deed Restriction thus constituting an impairment of contract as against the beneficiaries of the contract, to wit, the citizens of the municipality?"

In *Seattle v. Washington*, 23[illegible] U. S. 568, cited by appellees, the United States Supreme Court refused to interfere with the construction of an ordinance dealing with apportionment of street car fares after a transfer. No contention was raised in the case of impairment of contract and the Supreme Court specifically declared that *there was not involved in the case an impairment by later legislation.*

The case of *Fischer v. St. Louis*, 194 U. S. 361 cited by appellees is equally not in point. In that case the Supreme Court held that an ordinance which permitted the City to prohibit the erection of cow stables within prescribed limits did not deprive the defendant of his property without due process of law, nor deny to him the equal protection of the laws.

Appellee's contention that an interpretation of the deed and the power of the City to act are questions not reviewable in the United States Supreme Court are not supported by the two cases cited above and relied upon by appellee.

On the other hand, this Court has never deviated from the earlier decisions that a deed is a contract within the protection of Article I, Section 10 of the United States Constitution. The earliest case on this subject is *Fletcher v. Peck*, 10 U. S. 87.

In that case the Supreme Court denounced the action of the State of Georgia in adopting an abortive act which

sought to invalidate a sale of land previously made by the State to the grantor of the plaintiff. The Supreme Court said,

> "for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice."

In the present case there is a parallel, for here it is the Housing Authority who is seeking equally with the City to pronounce its own deed restriction invalid.

In the *Fletcher* case the Supreme Court went on to hold that a grant was an executed contract, and that the inhibition against impairment is applicable against the state.

In *Wood v. Lovell*, 313 U. S. 369, the Supreme Court similarly declared that land sold by the State

> "constituted the execution or consummation of a contract, the rights arising from which are protected from impairment by Article I, sec. 10 of the Constitution, and the obligation of the state arising out of such a grant is as much protected by Article I, sec. 10 as that of an agreement by an individual." (The court citing *Fletcher v. Peck.*)

In the great and celebrated case of *Dartmouth College v. Woodward*, 17 U. S. 654, the inhibition upon the states to impair by law the obligation of contracts, received the most elaborate discussion, and the most efficient and instructive application. The argument of the Supreme Court in this celebrated case contains one of the most full and elaborate expositions of the constitutional sanctity of

contracts to be met with in any of the reports. (1 Kent's Com. 415, 418.) See also a consideration of this case in 2 Story on the Constitution, Sections 1394, 1395.

In *Davis v. Gray*, 83 U. S. 232, an ordinance seeking to divest a railroad company of its title to land previously conveyed to it by the State, was declared by the United States Supreme Court to be a nullity. The court adding that it was too well settled that a land grant was a contract within the protection of the United States Constitution.

Appellee argues that any contract right protected by Section 10 of Article I, that may be involved is between the grantor housing authority and the City of Los Angeles as distinguished from the individuals forming the public. Reliance is made upon the case of *Walsh v. Columbus*, 176 U. S. 469.

In that case the *plaintiff did not seek relief as a taxpayer and on behalf of all other taxpayers.*

The right of a taxpayer to prevent the illegal expenditure, waste, or injury to the estate, funds, or property of a municipality is expressly granted by Statute in California Code of Civil Procedure, Section 526a.

This statute has been interpreted to authorize taxpayers suits to enjoin the diversion of municipal owned lands in violation of the trust upon which it is held.

Griffith v. Department of Public Works, 141 Cal. App. 2d 376;

O'Melveny v. Griffith, 178 Cal. 1;

Schaefer v. Berinstein, 140 Cal. App. 2d 278;

Marshal v. Standard, 17 Cal. App. 2d 19.

Appellee then argues that assuming for the sake of argument that there is involved a dedication for public

use, there is no violation of contract even as against the grantor in subsequently abandoning such public use.

This argument overlooks the principle that land acquired subject to a public purpose deed restriction is received in trust for public purposes.

Land acquired subject to a public purpose deed restriction cannot be sold. (*Futterer v. City of Sacramento*, 196 Cal. 248; *Hoadley v. San Francisco*, 50 Cal. 265; *Sawyer v. San Francisco*, 50 Cal. 370; *Hoadley v. San Francisco*, 70 Cal. 320, affirmed 124 U. S. 646.)

No California case has been cited by appellees which has upheld the power of a municipality to sell land acquired subject to a public purpose deed restriction.

The highest courts in other states have similarly held that a sale of land held subject to a public purpose restruction is prohibited. In *Warren v. Mayor*, 27 Iowa 351, and *Cook v. Burlington*, 30 Iowa 94, 98, the Supreme Court of Iowa held that such a sale would constitute an impairment of contract.

The effect of the conveyance from the Housing Authority was to vest legal title in the City of Los Angeles upon an express trust to use the land for public purposes. (*Hame v. City of Polson*, 215 P. 2d 950.) Such a conveyance created a trust with legal title in the City as trustee for the benefit of the public. (*City of New Orleans v. Louisiana*, 85 So. 2d 503.) The City had a right to accept such a trust. (*Ash v. City of Omaha*, 41 N. W. 2d 386, 396.)

There is no legal precedent in the state of California which will permit a municipality, chartered or otherwise, to extinguish a public purpose deed restriction imposed by the grantor, or to sell such land to a private corporation engaged for private profit.

Appellant does not question the power of the City of Los Angeles to dispose of, in accordance with the charter, land acquired unconditionally and to which it holds full title. Appellant does question the power of the city to either sell or extinguish a public purpose deed restriction imposed by the grantor for the benefit of all the taxpayers of the municipality. Such a conveyance is inalienable and would constitute an impairment of contract if authorized by legislative act.

No reply will be made at this time to appellees point 4 and point 5. If the court grants appellants request for the opportunity to present full briefs these points will then be coyered fully.

Reply to Appellees' Point II.

(The Federal Questions Sought to Be Reviewed Were Not Timely or Properly Raised or Expressly Passed on by the California Supreme Court.)

The issue of timeliness has been fully answered by appellant in the brief filed by appellant in reply to motion to dismiss of appellee Dodgers. Reference is hereby respectfully made to pages 17-19.

With respect to the contention that the Federal questions were not expressly passed upon, reference is made to the case of *Columbia v. South Carolina*, 261 U. S. 236.

In that case it was contended that the judgment of the state court was based upon its own construction of the contract and not at all upon the statute.

Answering this jurisdictional challenge the United States Supreme Court said,

> "But although the state court may have construed the contract and placed its decision distinctly upon

its own construction, if it appear, upon examination, that in real substance and effect, force has been given to the statute complained of our jurisdiction attaches.

"In Houston & T. C. R. Co. vs. Texas, 177 U. S. 66, 77, 44 L. ed. 673, 680, 20 Sup. Ct. Rep. 545, this court said:

'Thus we see that, although the decision of the state court was based upon the ground that the warrants in which these payments were made had been issued in utter violation of the state Constitution, and were hence void, and that no payments made with such warrants had any validity, and although this ground of invalidity was arrived at without any reference made to the Act of 1870, yet the necessary consequence of the judgment was that effect was thereby given to that act, and in a manner which the company has always claimed to be illegal and unwarranted by the act when properly construed. The company has never accepted such a construction, but, on the contrary, has always opposed it, and raises the question in this proceeding at the very outset. Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction, and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below.'"

The California Supreme Court expressly passed upon the validity of the ordinance and upheld the right of the City to extinguish the deed restriction. In answer to appellants contention that the sale or extinguishment of the

deed restriction would constitute an impairment of contract the court said,

> "It is contended that the city does not have power to sell to a private corporation land held by the city subject to a public purpose restriction imposed by the grantor's deed to the city and that the city has no power to enter into an agreement with a private corporation obligating the city to extinguish such a restriction."

The Supreme Court then proceeded to justify the extinguishment of the deed restriction on the *untenable* grounds that the deed restriction was not a valid deed restriction, and the restriction actually contemplates the possibility of a sale.*

Thus although the California Supreme Court did not mention the federal constitution such failure to do so may not deprive this court of its jurisdiction and of its duty to determine for itself the existence, construction and validity of the alleged contract, and also to determine whether as construed by this Court it has been impaired by the ordinance to which effect has been given by the California Court.

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*As discussed in detail in appellant's Jurisdictional Statement, pages 20 and 21, the Court's contention that the deed restriction contemplates a sale of the property to a private party is completely *untenable*. It requires the interpretation that the vital words "to be used for public purposes only," the basic restriction in the deed, are *superfluous*. The logical and obvious interpretation is that (1) the words "to be used for a public purpose" mean precisely what they say, and (2) that the restriction against housing was added to prevent the City or any *public* agency that might become a *successor* or *grantee* of the City using the property for public housing which would not be in conflict with the basic and primary restriction "to be used for public purpose only."

Reply to Appellees' Point III.

(The Judgment Rests on an Adequate Non-Federal Basis.)

The contention made by appellee that the judgment rests on an adequate non-federal basis is actually a repetition of appellees earlier point that the federal question was not passed upon by the California Supreme Court.

The jurisdiction of this Court to review a judgment of a state court, the effect of which is to deny a federal right, cannot be avoided by placing such judgment on non-federal grounds which are plainly untenable. (*Ward v. Board of County Commissioners,* 253 U. S. 17.)

It is respectfully submitted that the motion of the appellee City of Los Angeles is without merit and should be denied.

Respectfully submitted,

PHILL SILVER,

Attorney for Appellant.